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1956

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Vol. 2

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Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

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South Eastern Railway Co. *v.* Cooper	[1924] 1 Ch. 211	*Appl.*	215, 227, 228, 240, 248, 251
South Eastern Railway Co. *v.* Warr	21 L.G.R. 65, 669	*Appl.*	215, 243–246, 248, 249
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West *v.* Gwynne	[1911] 2 Ch. 1; 27 T.L.R. 444		453
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STATUTES JUDICIALLY CONSIDERED

1780

Sunday Observance Act, 1780 (21 *Geo.* 3, *c.* 49), *s.* 1 - - - **Divl.Ct. 71**

1816

Habeas Corpus Act, 1816 (56 *Geo.* 3, *c.* 100), *ss.* 3, 4 - - - **Divl.Ct. 109**

1845

Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 16, 68 **Divl.Ct. and C.A. 214**

1847

Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *s.* 72 - - - **C.A. 596**

1848

Justices Protection Act, 1848 (11 & 12 *Vict. c.* 44), *s.* 2 - **Diplock J. and C.A. 288**

1852

Common Law Procedure Act, 1852 (15 & 16 *Vict. c.* 76), *s.* 212 - - **C.A. 1**

1863

Sowerby Bridge Local Board Act, 1863 (26 *Vict. c. lii*), *ss.* 6, 19 - - **C.A. 596**

1869

Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 13 (1) - - - - **C.C.A. 424**

1870

Coinage Act, 1870 (33 & 34 *Vict. c.* 10), *s.* 6 **Lord Goddard C.J. and C.A. 127**

1907

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1913

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1920

Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 2 (1) (*b*) (3) - **C.A. 612**

1925

Law of Property Act, 1925 (15 & 16 *Geo.* 5, *c.* 20), *s.* 62 - - - **C.A. 612**

Rating and Valuation Act, 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 11 (1) - - **C.A. 596**

Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 46 - - - - - **C.A. 1**

1928

Rating and Valuation (Apportionment) Act, 1928 (18 & 19 *Geo.* 5, *c.* 44), *s.* 3 (2) (3) - - - - - **C.A. 40**

1930

Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 10 (1), *Sch. I* (*as amended by Road Traffic Act*, 1934 (24 & 25 *Geo.* 5, *c.* 50), *s.* 2 (1) (2)) - **Divl.Ct. 404**

—— —— *ss.* 35 (1), 36 (1) (*b*) - **C.A. 180**

1932

Rights of Way Act, 1932 (22 & 23 *Geo.* 5, *c.* 45), *ss.* 1, 2 - **Divl.Ct. and C.A. 439**

1933

Local Government Act, 1933 (23 & 24 *Geo.* 5, *c.* 51), *s.* 76 (1), *proviso* - **Divl.Ct. 369**

Road and Rail Traffic Act, 1933 (23 & 24 *Geo.* 5, *c.* 53), *s.* 9 (2) - - **Divl.Ct. 404**

1935

Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 *Geo.* 5, *c.* 30), *s.* 6 (1) (2) - - **C.A. 180**

1936

Housing Act, 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 51), *ss.* 59 (3), 61, 65 - **C.A. 673**

Public Health Act, 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 49), *ss.* 129, 328 - **C.A. 596**

1937

Factories Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 67), *s.* 60 (*as amended by Factories Act*, 1948, *s.* 12) - - **Divl.Ct. 396**

1938

Hire-Purchase Act, 1938 (1 & 2 *Geo.* 6, *c.* 53), *s.* 12 (1) (2) - - - **C.A. 32**

1939

Limitation Act, 1939 (2 & 3 *Geo.* 6, *c.* 21), *s.* 21 **Diplock J. and C.A. 288**

1943

Law Reform (Frustrated Contracts) Act, 1943 (6 & 7 *Geo.* 6, *c.* 40), *s.* 1 (3) **Sellers J. 410**

1945

Water Act, 1945 (8 & 9 *Geo.* 6, *c.* 42), *s.* 38 (3) **C.A. 596**

1947

Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6, *c.* 51), *ss.* 12 (5) (*b*), 13 (1), 23 (1) (4) - - - **Divl.Ct. 386**

1948

Local Government Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 26), *s.* 62 (1) - - - **C.A. 596**

1949

Civil Aviation Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 67), *s.* 62 - - **Devlin J. 272**

Lands Tribunal Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 42), *s.* 1 - - - **C.A. 596**

Legal Aid and Advice Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 51), *s.* 1 (5) - **C.A. 93**

—— —— *s.* 3 (4) - - - **Devlin J. 18**

1951

National Parks and Access to the Countryside Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 97), *s.* 31 - - **Divl.Ct. and C.A. 214**

Common Informers Act, 1951 (14 & 15 *Geo.* 6, *c.* 39), *s.* 1 (3) - - **Divl.Ct. 71**

1954

Housing Repairs and Rents Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 53), *s.* 35 (1) - **C.A. 525**

Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 30 (1) (*f*) (*g*), (2), 31 (1) **C.A. 78**

—— —— *s.* 44 - - - - **C.A. 569**

STATUTORY RULES, ORDERS AND INSTRUMENTS JUDICIALLY CONSIDERED

County Court Rules, *Ord.* 23, *r.* 14 - **C.A. 534**

Dangerous Drugs Regulations, 1953 (*S.I.* 1953, *No.* 499), *reg.* 3 - **Devlin J. 272**

Legal Aid (*General*) *Regulations*, 1950 (*S.I.* 1950, *No.* 1359) (*as amended*), *regs.* 8 (1) (*b*), 14 (3) (*c*), 18 (3) (*b*) **Devlin J. 18**

—— —— *reg.* 11 (2) - - - **C.A. 93**

Motor Vehicles (*Variation of Speed Limit*) *Regulations*, 1955 (*S.I.* 1955, *No.* 1880), *regs.* 2, 3, *Sch.* - **Divl.Ct. 404**

Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy in Premises under the Factory and Workshop Acts, 1901 *and* 1907 (*S.R. & O.*, 1908, *No.* 1312), *reg.* 1 - - - - **Divl.Ct. 396**

Town and Country Planning General Development Order, 1950 (*S.I.* 1950, *No.* 728), *art.* 3 (1), *Sch. I*, *class* 4 (2) **Divl.Ct. 386**

ERRATUM

[1956] 1 Q.B. 33. Footnote 39. *For* [1926] A.C. 578 *read* [1926] A.C. 518.

CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM
OR FROM COUNTY COURTS

AND BY THE

COURT OF CRIMINAL APPEAL

GILL AND ANOTHER *v.* LEWIS AND ANOTHER.

[1955 G. No. 785.]

C. A.

1956
Mar. 13, 14.

Singleton, Jenkins and Hodson L.JJ

Landlord and Tenant—Joint tenancy—Action by or against joint tenants—Action for arrears of rent and possession—Ejectment order against one of joint tenants—Part-payment of arrears before order—Balance of arrears and costs paid subsequently—Claim by joint tenants for relief from forfeiture—Ejectment order against one tenant only ineffective—Proceedings in action by landlord to be discontinued and parties to be restored to original position—Common Law Procedure Act, 1852 (15 *&* 16 *Vict. c.* 76), *s.* 212.

Landlord and Tenant—Forfeiture of lease—Relief from forfeiture—Payment of arrears of rent and costs—Tenants previously in arrear—Premises used for indecent assaults on boys—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 46.

The defendants, L. and W., had been granted as joint lessees a tenancy of two dwelling-houses. They proved, according to the plaintiff lessors, to be bad payers of the rents and when it was sought to enforce payment of arrears by legal proceedings one or both of them could not be found for service of the writ.

On April 1, 1955, the arrears of rent then amounting to £412 10s., the plaintiffs issued a writ claiming the arrears and costs, and also possession of the premises. The writ was served on W., but could not be served on L., who, it was later ascertained, was in prison, having been convicted of indecent assaults on boys in one of the leased houses and sentenced to two years' imprisonment. Appearances were entered for both defendants, but neither appeared at the trial and the plaintiffs signed judgment in default against W. alone. Before the signing of judgment £400 was paid by the defendants by way of arrears of rent and afterwards the balance of the arrears and the costs were also paid.

On July 13, 1955, the defendants applied by summons for relief from forfeiture under section 46 of the Supreme Court of Judicature (Consolidation) Act, 1925, and section 212 of the Common Law Procedure Act, 1852. The master granted relief and his decision was upheld by Pearson J.

On appeal by the plaintiffs:—

Held, (1) that to obtain an effective judgment for possession against joint tenants judgment must be obtained against both of them.

Fairclough (T. M.) & Sons Ltd. v. *Berliner* [1931] 1 Ch. 60 applied.

(2) That the reference in section 212 of the Common Law Procedure Act, 1852,[1] to "the trial" meant an effective trial and judgment binding on all necessary parties; accordingly, since judgment had only been obtained against W., there had not been an effective trial within section 212, and, as the whole amount due for rent and costs had been paid or tendered, all further proceedings in the action should be discontinued and an order for relief should be made.

(3) That even if judgment had been obtained against both defendants before the whole of the money had been paid, no such exceptional circumstances had been made out to justify the court in refusing relief on payment or tender of the amount due and, therefore, the defendants would have been entitled to relief under section 46 of the Judicature Act, 1925.[2]

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[1] Common Law Procedure Act, 1852, s. 212: "If the tenant or his "assignee do or shall, at any time "before the trial in such ejectment, "pay or tender to the lessor or land- "lord, his executors or administra- "tors, or his or their attorney in that "cause, or pay into the court where "the same cause is depending, all the "rent and arrears, together with the "costs, then and in such case all "further proceedings on the said eject- "ment shall cease and be discon- "tinued; and if such lessee, his exe- "cutors, administrators, or assigns, "shall, upon such proceedings as "aforesaid, be relieved in equity, he "and they shall have, hold, and enjoy "the demised lands, according to the "lease thereof made, without any new "lease."

[2] Supreme Court of Judicature (Consolidation) Act, 1925, s. 46: "In "the case of any action for a forfeit- "ure brought for non-payment of rent, "the High Court or a judge thereof "shall have power to give relief in a "summary manner, and subject to the "same terms and conditions in all "respects as to payment of rent, costs "and otherwise as could formerly "have been imposed in the Court of "Chancery, and if the lessee, his "executors, administrators or assigns "are so relieved they shall hold the "demised premises according to the "terms of the lease and without the "necessity of any new lease."

Quaere whether the judgment signed in default of appearance might not have been supported as an effective judgment against both defendants, on the ground that in an action for possession against two or more joint tenants service of the writ upon one constitutes good service on the others or other of them; see note to R.S.C., Ord. IX, r. 9, in the Annual Practice, 1956.

Stanhope v. *Haworth* (1886) 3 T.L.R. 34; *Newbolt* v. *Bingham* (1895) 72 L.T. 852 and *Bowser* v. *Colby* (1841) 1 Hare 109 considered.

Decision of Pearson J. affirmed; order varied.

APPEAL from Pearson J. (in chambers).

The plaintiffs, Reginald Edwin Gill and Miss Edna Bradshaw, as the personal representatives of Mrs. Ida Janet Dufour Cole, sued the defendants, Archibald Lewis and Neville Wright, for possession of two dwelling-houses, Nos. 90 and 92, Ifield Road, Kensington, alleging non-payment of rent. The premises were let by Mrs. Cole to the defendants jointly, No. 92 for five years from Dec. 25, 1952, and No. 90 for ten years from Oct. 1, 1953, at a total rent of £825, payable quarterly in advance. The leases contained covenants to use the premises as private dwelling-houses only, not to cause any nuisance or annoyance to the landlord or adjoining owners, and not to underlet or part with possession without consent in writing of the landlord.

The defendant Lewis, a coloured man, was a singer or entertainer, and the defendant Wright was his manager. They spent much of their time touring the country. The plaintiffs complained that the defendants had always proved to be bad payers and that when it was sought to enforce payment by legal proceedings the defendants were difficult to find. On March 26, 1954, the plaintiffs issued a writ claiming rent due. Only Lewis could then be found, and on July 6, 1954, judgment was obtained against him for the arrears, which were then paid. On June 30, 1954, a second writ was issued for arrears of rent then due, and after substituted service judgment was obtained against both defendants for the arrears of rent and costs. That rent was also paid, but the costs were left outstanding for a long time.

Mrs. Cole died on January 22, 1955, and the plaintiffs, having obtained probate, on April 1, 1955, issued a third writ claiming possession of the premises, arrears of rent amounting to £412 10s. and costs. On this occasion service was found possible on Wright, but Lewis could not be found, he having, as it transpired, been convicted of indecent assaults on two boys at No. 92, Ifield Road and sentenced to two years' imprisonment. Appearances to the action were entered for both defendants, but neither appeared, and on May 17, 1955, the plaintiffs signed judgment in default against Wright. Before the signing of judgment £400 was paid by the defendants by way of arrears of rent, leaving £12 10s. still owing in addition to costs. The balance was subsequently paid.

On July 13, 1955, the two defendants applied by summons under section 46 of the Supreme Court of Judicature Act, 1925, read in conjunction with sections 210, 211 and 212 of the Common Law Procedure Act, 1852, for relief from forfeiture. Master Grundy granted relief, and Pearson J. on October 11, 1955, affirmed his decision, doubting whether he (the judge) had any discretion in the matter on proof of tender or payment of the arrears, but adding that, if he had, it should be exercised in favour of the defendants.

The plaintiffs appealed.

Christopher Grundy for the plaintiffs. Under section 212 of the Common Law Procedure Act, 1852, if the arrears of rent are paid before judgment, then the proceedings shall cease and be discontinued, but if, as in the present case, the arrears are not paid before judgment, then the defendants must apply for relief in equity within six months. It is agreed that the judge has a discretion, but this is not a case where the court should exercise its discretion in favour of the defendants. There is a history of bad payment and one of the defendants has committed criminal acts on the premises and has been convicted and sentenced to imprisonment. Relief should not be granted where the defendants ought not to be put back on the same basis.

[Jenkins L.J. So far as one of the joint tenants is concerned, there has been no judgment and the judgment against the other is ineffective. What is the result?]

If the court takes the view that the judgment, although signed, is of no effect, it would be difficult to enforce, but it is submitted that, whether or not it is effective, it does exist. The defendants' right course would have been to apply for a stay.

[Jenkins L.J. The judgment in *Fairclough (T. M.) & Sons Ltd.* v. *Berliner* [3] shows that judgment for ejectment cannot be obtained against only one of joint tenants.]

Assuming that Wright can ask for relief and Lewis also can do so the court still has a discretion in granting relief. Relief is not automatic on payment of arrears of rent and costs. The jurisdiction is inherent in its history as an equitable remedy.

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[3] [1931] 1 Ch. 60.

[SINGLETON L.J. How is the court to exercise its jurisdiction?]

In the ordinary case, where there is only non-payment of rent, then the relief is of right and would be granted on payment of arrears.

[SINGLETON L.J. Is the court entitled to look at anything else?]

It must take into consideration all the surrounding facts and particularly the behaviour of the defendants.

[SINGLETON L.J. Are you entitled to take into consideration the conduct of one of them?]

Yes. They are joint tenants and each must be responsible.

[SINGLETON L.J. The indecent assaults occurred in No. 92. Does that affect the adjoining house and joint tenants?]

Defendants can only ask for relief on grounds of equity and they must come with clean hands. This is a case where the tenants asking for relief have all the equities against them and they are not entitled to equitable relief. The judge did not consider whether the parties could be put back into the same position without injustice to the plaintiffs. [*Stanhope* v. *Haworth* [4]; *Newbolt* v. *Bingham* [5]; *Bowser* v. *Colby* [6]; *Chandless-Chandless-Chandless* v. *Nicholson* [7]; and Halsbury's Laws of England, 2nd ed., Vol. 20, p. 264, were also referred to.]

C. E. Rochford for defendants. The payment of rent was delayed because the defendant Wright was negotiating for the purchase of the premises. The judgment against Wright was ineffective, although Lewis had to issue a summons for relief. Wright took the proper course in applying for relief and obtaining the consent of Lewis to entering a like application on behalf of Lewis. The plaintiffs should not have signed judgment against one of the joint tenants. There was nothing to prevent them from applying for judgment against the other tenant. The judgment against Wright being ineffective, and the arrears of rent and the costs of the proceedings having been paid, section 212 of the Common Law Procedure Act, 1852, applies, and that is the end of the matter. Section 46 of the Judicature Act, 1925, confirms the power of the court to grant relief. Relief should be granted in all but the most exceptional cases where the statutory conditions have been satisfied. Lord Greene M.R., in *Chandless-Chandless-Chandless* v. *Nicholson*,[8] stated in clear terms the principles on which the old Chancery Court acted and those

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[4] (1886) 3 T.L.R. 34.

[5] (1895) 72 L.T. 852.

[6] (1841) 1 Hare 109.

[7] [1942] 2 K.B. 321.

[8] Ibid. 321.

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principles have to be followed today under later statutes. *Newbolt* v. *Bingham*[9] indicates the principle on which relief is granted. If the lessor gets his rent, although late, it is not to be for this purpose to his detriment. The judge considered carefully the law on the subject and exercised his discretion after full consideration of the facts. This court should not interfere with his judgment.

Singleton L.J. I will ask Jenkins L.J. to deliver the first judgment.

Jenkins L.J. stated the facts, saying: By arrangement with Wright appearance was entered for both defendants, and I suppose service was waived so far as Lewis was concerned. [His Lordship continued:] On the part of the plaintiff landlords it is urged that the court's jurisdiction in this matter is a discretionary jurisdiction; and, while it is conceded that in the ordinary way the court will make the order as a matter of course when satisfied that the landlord has received, or has been tendered, all that is due to him for rent and for costs, that is not a wholly inflexible rule, for the conduct of the tenant may be looked into, and if upon looking into his conduct it may appear that it would be inequitable or unfair to grant relief, the court ought, in the exercise of its discretion, to refuse relief.

As grounds on which, in his submission, relief should have been refused by the judge in the present case, Mr. Grundy relied, in effect, on three matters. The first was the previous history of the difficulties which the landlords had experienced in extracting the rent from the defendants; the second was the elusive habits of the defendants, which led to difficulties of service; and the third was the defendant Lewis's conviction of the two acts of indecent assault, committed actually upon a part of the demised premises. Taking all those matters into consideration the judge (says Mr. Grundy) ought to have come to the conclusion that the defendants here were so wholly unmeritorious that it would be inequitable to grant them relief so as to saddle the landlords for a further period with such undesirable tenants.

On the other hand, Mr. Rochford, for the defendants, says that, although there may be exceptions, a case must be an exceptional one indeed for the court to refuse relief on other grounds when all the rent and costs have been paid up. He does not go so far, I think, as to say that the court would never refuse relief, but he says that the court would only do so in very exceptional circumstances, such as do not exist in this case.

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[9] 72 L.T. 852.

Those, briefly, are the arguments as presented to the judge and to us on the footing that this application properly came before the court as an application under section 46 of the Judicature Act, 1925. I should next refer to that section and, briefly, to the relevant sections of the Common Law Procedure Act, 1852. Section 46 of the Act of 1925 (which substantially replaces section 1 of the Common Law Procedure Act, 1860) is in these terms: "In the case of any action for a forfeiture "brought for non-payment of rent, the High Court or a judge "thereof shall have power to give relief in a summary manner, "and subject to the same terms and conditions in all respects "as to payment of rent, costs and otherwise as could formerly "have been imposed in the Court of Chancery, and if the lessee, "his executors, administrators or assigns are so relieved they "shall hold the demised premises according to the terms of the "lease and without the necessity of any new lease."

The provisions of the Common Law Procedure Act, 1852, to which I need refer are these. Section 210 provides (to put it shortly) that a landlord is to have a right to re-enter when there is a half-year's rent in arrear; and then it goes on to stipulate that any claim to relief (under what was then purely the old equitable jurisdiction) which a tenant desires to make must be made within six months after execution of the judgment in respect of which relief is sought. It therefore sets a time limit on the equitable jurisdiction to which I understand a tenant could formerly appeal at any distance of time. The time limit was first imposed by the Landlord and Tenant Act, 1730, which was in this respect substantially reproduced by section 210 of the Act of 1852.

Section 211 is to the effect that relief is not to be granted except upon payment of everything that is due to the landlord for rent in arrear and costs. That again imposes a condition or restriction on the claim to relief.

Section 212 differs from the two preceding sections in that it confers on a tenant a substantive right and does not merely lay down conditions for the exercise of an existing right. It is in these terms: "If the tenant or his assignee do or shall, at any "time before the trial in such ejectment, pay or tender to the "lessor or landlord, his executors or administrators, or his or "their attorney in that cause, or pay into the court where the "same cause is depending, all the rent and arrears, together "with the costs, then and in such case all further proceedings "on the said ejectment shall cease and be discontinued; and if "such lessee, his executors, administrators, or assigns, shall, "upon such proceedings as aforesaid, be relieved in equity, he "and they shall have, hold, and enjoy the demised lands, according to the lease thereof made, without any new lease." It is to be observed that in cases to which that section applies "all "further proceedings on the said ejectment shall cease and be "discontinued"; and it is to be observed, further, that it applies only to a case in which the amount due to the landlord is paid or tendered before the trial.

Those being the statutory provisions, I should briefly consider their application in the present case. It will be remembered that, the defendant Lewis not having been served, the plaintiffs signed judgment against the defendant Wright alone on May 17, 1955. Judgment for possession of premises held by joint tenants was thus obtained against one only of those joint tenants. There has been a good deal of discussion in the course of the hearing before us as to the effect of a judgment for possession against one only of two joint tenants. and it raises a question of some difficulty; but it seems to me that the right view must be that in order to get an effective judgment for possession against joint tenants judgment must be obtained against both of them. I cannot see that a judgment against one only, both being equally entitled to possession of the whole premises as joint lessees thereof, can have any effect at all. If that view is right, then the position seems to me to be this. I think that the reference in section 212 of the Common Law Procedure Act, 1852, to "the "trial" must be a reference to an effective trial binding on all necessary parties, and, I would add, an effective judgment binding on all necessary parties. When all that has happened is that judgment for possession has been signed against one only of two joint tenants, I do not think there has been a completed "trial" within the meaning of section 212, or an effective judgment for possession.

Although the defendants did not pay the whole of what was due from them before the judgment of May 17, 1955, they have since in fact paid or tendered the whole. And if, so far as the claim for possession is concerned, there has as yet been no effective trial, the result appears to me to be that there has as yet been no "trial" within the meaning of section 212; and as the whole amount due for rent and costs has been paid or tendered, section 212 applies to the case and "all further proceedings" in the action should "cease and be discontinued." I think that, as a corollary to this, having regard to the concluding words of section 212, the court ought to make an order for relief so as to restore the parties to their original position.

If that view is right, it is enough to dispose of the case; but I propose to deal also with the matter as it would stand if judgment had been obtained against both joint tenants before the whole of the amount due for rent and costs had been paid or tendered. I have already outlined the arguments on either side on the hypothesis that this was simply a case of two joint tenants, after judgment for possession against both, seeking relief under section 46 of the Judicature Act, 1925, as distinct from a case under section 212 of the Common Law Procedure Act, 1852. By way of illustration of the manner in which the jurisdiction to grant relief from forfeiture for non-payment of rent has been exercised by the courts Mr. Grundy referred us to *Stanhope* v. *Haworth*,[1] in which an order had been made for possession for non-payment of rent, and the premises were a colliery. Relief was applied for towards the end of the period of six months allowed by section 210 of the Act of 1852. It was held that the parties had so altered their position in the meantime that it would be inequitable to grant relief. It appears that in the meantime the landlord had let other people into possession and had made arrangements with them for the working of the colliery, and a considerable amount of money had been spent on the footing that the lease was at an end. Lord Esher M.R. said[2]: "Then the court was asked to give equitable relief under "the Common Law Procedure Act, 1852, but the defendant, "having judgment against him, had made no application until "just before the end of the six months, and in the meantime the "position of the plaintiff had become altered, as he had to keep "up the colliery at considerable expense, and other parties who "offered to take it had laid out money in purchasing plant to "work the colliery and were now in possession. It would be "unjust now to allow the tenant to dispossess them and resume "possession of the colliery."

Lindley L.J., concurring, said[3]: "The tenant [he said] had "delayed his application for relief until just before the end of "the six months, and in the meantime the position of the plaintiff "was altered. The plaintiff had in the meantime kept the

[1] (1886) 3 T.L.R. 34.

[2] 3 T.L.R. 34, 35.

[3] Ibid.

"colliery up, and had entered into an arrangement with other "parties to let the colliery to them. There was no explanation "of the delay by the tenant except that he had not had the "money. That was no reason for allowing him now to have relief "to the prejudice of the other parties, and it would be unreasonable to give him such relief."

Lopes L.J. concurred.[4] He said that he quite agreed with the Divisional Court "that it would be 'monstrous' now to "give the tenant such relief as he asked. Relief ought not to be "granted if the landlord and other parties interested could not be "put in the same position as before, and here that was impossible, and the relief asked for would be unjust and inequitable."

It will be observed that in that case the landlord and those dealing with him had altered their position on the footing that the lease to the party seeking relief was at an end, and they had been led to do that because the tenant had waited until almost the end of the period of six months allowed to him before he claimed relief. So that case shows that where parties have altered their position in the meantime, and in particular where the rights of third parties have intervened, relief ought not to be granted where the effect of it would be to defeat the new rights of third parties or be unfair to the landlord having regard to the way in which he has altered his position.

I next refer to *Newbolt* v. *Bingham*[5] for the statements of general principle contained in the judgments. Lord Esher M.R. said[6]: "It seems to me that these Acts of Parliament give very "large powers of relief to the court. That power is to be "exercised by a judge in chambers. But the position of the "judge at chambers as regards granting this relief is made by "the Act as nearly as possible the same as that of a judge in a "court of equity before the Act. If, at the time relief is asked "for, the position has been altered, so that relief could not be "given without causing injury to third parties, I think that the "case that was cited to us (*Stanhope* v. *Haworth*[7]) applies. "But if, at the time of the application, the position is not "altered, so that no injustice will be done, I think, if the conditions mentioned in the section are complied with, that, "according to the settled practice in equity, there is no longer a "discretion in the judge, but that he ought to make the order. "It does not matter whether it is called discretionary or not, if "the discretion ought always to be exercised in one way. If

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[4] 3 T.L.R. 34, 35.

[5] (1895) 72 L.T. 852.

[6] Ibid. 853.

[7] 3 T.L.R. 34.

"the conditions are complied with, and no interests of third "parties have intervened, there is no longer any real discretion in "the matter. The order for relief in this case will, therefore, "be made, if all repairs required by the covenants are done to "the satisfaction of a surveyor within one month, and the rent "in arrear and all costs, including the costs of this appeal, are "paid."

Smith L.J. agreed, without, I think, adding anything material. Rigby L.J. said[8]: "I am of the same opinion. It was the "settled practice of a court of equity to grant relief against "forfeiture for non-payment of rent on payment of all rent in "arrear and costs. Of course, the court was not absolutely "bound by its practice where it would not do justice, and if "some new interest had been created before the application, the "court would refuse to interfere. That was not done to put the "landlord in a better position, but because the rights of third "parties had intervened. I know of no case where a court of "equity has refused relief because actions had had to be brought "on previous occasions to recover the rent. The Common Law "Procedure Act, 1852, section 210, established a new procedure "in actions of ejectment for non-payment of rent; but, upon "the terms of the proviso, a mortgagee not in possession has "lost nothing at all of his right to apply to the equitable juris-"diction, which is now, by section 1 of the Common Law "Procedure Act, 1860, vested in the judge at chambers. I am "of opinion, therefore, that, upon performing the conditions "mentioned in the proviso—that is, upon repairing the premises "in accordance with the covenant to the satisfaction of a "surveyor to be appointed by the parties or by the judge at "chambers, and on payment of rent in arrear and all costs—the "relief prayed for should be granted."

Mr. Grundy relied in support of his argument on the broad equitable principles embodied in such maxims as "He who comes "to equity must come with clean hands," and "He that seeks "equity should do equity." Mr. Rochford referred us to other cases tending to support his argument that relief ought to be granted in all but the most exceptional cases where the statutory conditions have been satisfied. He referred us to the opening passage of the judgment of Lord Greene M.R. in *Chandless-Chandless-Chandless* v. *Nicholson*.[9] I do not think I need take up time by reading that passage, but Mr. Rochford relies on it because Lord Greene did there set out the effect of the equitable jurisdiction in terms tending to support Mr. Rochford's view.

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[8] 72 L.T. 854.

[9] [1942] 2 K.B. 321; [1942] 2 All E.R. 315.

Then there was *Nance* v. *Nalor*,[10] in which the tenant seeking relief had actually signed an undertaking to pay the amount due and to give up vacant possession of the premises, but even in the face of that express undertaking it was held that the tenant could still claim relief under the equitable jurisdiction, and that the undertaking afforded no sufficient reason for excluding him from relief.

On the other hand, Mr. Rochford, very properly, referred us to *Bowser* v. *Colby*[11] as it tended to support the view of the matter taken by his opponent. It was a judgment of Wigram V.-C., and it shows quite clearly that, in his view, in the exercise of the equitable jurisdiction to grant relief it was proper to consider the conduct of the parties, and the conduct of the parties might be such as to make it wrong and inequitable to grant relief. In the first passage to which we were referred he said, in laying down the general principle[12]: "The object of the "proviso in both cases is to secure to the landlord the payment "of his rent; and the principle of the court is—whether right "or wrong is not the question—that, if the landlord has his "rent paid him at any time, it is as beneficial to him as if it "were paid upon the prescribed day." Then, having stated that general principle, he deals with the point for which Mr. Rochford cited the case[13]: "I think it is clear that the defen-"dants have a right to bring before me any breaches of covenant "which may have been committed other than the non-payment "of rent, and which, if committed, would have occasioned a "forfeiture of the lease. Whether those breaches of covenant "are to be proved in the cause, or to be tried in an issue, must, "I apprehend, depend very much on the form and the course "which the pleadings have taken." Then a little later on he said[14]: "I have no doubt that the court is bound to take notice "of the conduct of the plaintiffs' testator in dealing with the "property comprised in the lease, in considering the question "whether he would have been entitled in equity to redeem the "lease, although such conduct might not of necessity involve "any breach of the covenants contained in it."

In the course of some further observations of later date the Vice-Chancellor said[15]: "Thirdly, I was of opinion with the

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[10] [1928] 1 K.B. 263; 44 T.L.R. 11.

[11] (1841) 1 Hare 109.

[12] Ibid. 130.

[13] Ibid. 132.

[14] Ibid. 132, 133.

[15] Ibid. 133, 134.

"defendants (the Colbys) that they were entitled, at the hearing "of this cause, to prove any breaches of covenant by the "plaintiffs' testator, other than that for the payment of rent; "and that, if breaches of such other covenants were proved, for "which the plaintiffs might have been ejected, this court would "not relieve against the breach of covenant for payment of rent."

As to that case, it clearly shows that in the view of the Vice-Chancellor other matters besides the non-payment of rent and the right of the landlord to receive in full his rent and costs before relief is granted were proper to be taken into account, and in particular breaches of other covenants under the lease, and even conduct not amounting to a breach of covenant. I think that this goes decidedly further than the more modern authorities. I do not consider that today it would be, generally speaking, legitimate to take into account other breaches of covenant. It should be remembered that many years after *Bowser* v. *Colby*[16] was decided the Conveyancing Act, 1881, made it necessary, before bringing any action for forfeiture for breach of covenant, to serve a notice specifying the breaches and requiring them to be remedied if capable of remedy. So that what would have been available breaches of covenant at the time of the Vice-Chancellor's decision in *Bowser* v. *Colby*[17] would not have been available breaches at the present time for want of the notice required by what is now section 146 of the Law of Property Act, 1925. Nevertheless, it is a useful authority as showing that the court is not to exercise this equitable jurisdiction, as it were, "in blinkers."

As to the conclusion of the whole matter, in my view, save in exceptional circumstances, the function of the court in exercising this equitable jurisdiction is to grant relief when all that is due for rent and costs has been paid up, and (in general) to disregard any other causes of complaint that the landlord may have against the tenant. The question is whether, provided all is paid up, the landlord will not have been fully compensated; and the view taken by the court is that if he gets the whole of his rent and costs, then he has got all he is entitled to so far as rent is concerned, and extraneous matters of breach of covenant, and so forth, are, generally speaking, irrelevant.

But there may be very exceptional cases in which the conduct of the tenants has been such as, in effect, to disqualify them from coming to the court and claiming any relief or assistance whatever. The kind of case I have in mind is that of a tenant falling into arrear with the rent of premises which he was notoriously using as a disorderly house: it seems to me that in a case of that sort if the landlord brought an action for possession for non-payment of rent and the tenant applied to the court for relief, the court, on being apprised that the premises were being consistently used for immoral purposes, would decline to give the tenant any relief or assistance which would in any way further his use or allow the continuance of his use of the house for those immoral purposes. In a case of that sort it seems to me that it might well be going too far to say that the court must disregard the immoral user of the premises and assist the guilty tenant by granting him relief.

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[16] 1 Hare 109.

[17] Ibid.

I cannot, however, find any facts in the present case approaching the exceptional state of affairs I have in mind. Here we have the previous actions for rent, but, in my view, those are not material; and it will be remembered that Rigby L.J. said in *Newbolt* v. *Bingham* [18] that he knew of no case where a court of equity had refused relief because actions had had to be brought on previous occasions to recover rent. Nor, in my view, can anything really be made of the difficulty experienced in finding the two defendants for the purpose of bringing proceedings against them to recover the rent. Other breaches of covenant are hinted at, but none of them is clearly dealt with in the evidence, and I do not think it can affect the result so far as the present case is concerned. If there are indeed other breaches of covenant, then a landlord objecting to them has his remedy in bringing an action for breach of the covenants in question after all proper notices have been given.

We are left as the sole reason for refusing relief the fact of the two acts of indecent assault committed by the defendant Lewis at No. 92, Ifield Road, against two boys. Mr. Grundy urged that that matter was enough in itself to justify the court in refusing relief. This is the aspect of the case which has occasioned me most difficulty, but, in my view, that matter is not in itself enough to justify the court in refusing relief. So far as the evidence goes, although there are some rather vague hints in an affidavit filed on the plaintiffs' side, this was apparently one isolated instance. We have no evidence at all beyond the bare fact of the conviction; we know nothing of the circumstances. I should add that it is a charge made against one only of the two joint tenants, and the acts were done at one only of these two houses, which are comprised in two separate and distinct leases.

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[18] 72 L.T. 852.

I am therefore of opinion that no such exceptional case is here made out as to justify the court in refusing relief on payment or tender of the whole of the amount due. Accordingly, if the matter depends on the equitable jurisdiction to give relief, I think that the defendants are entitled to succeed in this appeal. If I am right in the view I have formed that, in view of the fact that the judgment obtained was obtained against Wright only, section 212 of the Act applies to the case, the same result is (as I understand it) produced independently of any question as to the proper mode of exercising the equitable jurisdiction.

I should add a reference to a case which I omitted to mention in dealing with the effect of the judgment obtained against Wright alone. That was the decision of Maugham J. in *Fairclough (T. M.) & Sons Ltd.* v. *Berliner.*[19] The effect of that case was that one of two joint tenants could not claim relief from forfeiture under section 146 of the Law of Property Act, 1925, and the judge's ground for so holding was that one of two joint tenants was not the "lessee" within the meaning of section 146 of that Act. There are, in such a case, joint lessees, and neither of the two lessees can be held himself alone to be the lessee. I think this affords some support for the view that in the present case, inasmuch as the two joint tenants together jointly constituted the "lessees" or "tenants" of the premises, and neither of them could be held to be the lessee or tenant by himself alone, any judgment for possession, to be effective, should have been obtained against both.

For the reasons I have endeavoured to state I am of opinion that the result arrived at by the judge in this case was right, and that the appeal fails and should be dismissed.

I feel bound to add, by way of postscript, that it was not argued before us that the judgment signed in default of appearance might be supported as an effective judgment for possession against Lewis as well as Wright, on the ground that in an action for possession against two or more joint tenants service of the writ upon one constitutes good service on the others or other of them. See the note to R.S.C., Ord. IX, r. 9, in the Annual Practice, 1956, to which we were not referred. This point (which does not affect the result in the present case) is therefore to be regarded as open in any future case in which it may arise.

[19] [1931] 1 Ch. 60.

HODSON L.J. I agree. In my opinion no question of relief against forfeiture arises, because I think that this case falls within the language of section 212 of the Common Law Procedure Act, 1852. It is true that judgment has been given against one of the tenants (who are the defendants here), but the judgment against him is not an effective judgment and not a judgment against both. That the judgment is ineffective is, I think, supported by the reasoning of Maugham J. in *Fairclough (T. M.) & Sons Ltd.* v. *Berliner*,[20] to which reference has just been made.

The position, therefore, is this, that (adapting the language of section 212) the action is one for ejectment; that there has been no trial; and that before trial, or before effective trial, the tenants have paid or tendered to the lessor or landlord all the rent and arrears, together with the costs. There is a reference in the section to payment into court where the cause is depending. This section covers the present case, and the consequence laid down by the section is that all further proceedings on the ejectment shall cease and be discontinued. In my judgment the order which should issue from this court ought to reflect the bidding of that section, and, accordingly, proceedings instituted by the landlord must be ordered to cease or be discontinued.

If the question of relief had to be considered, the rule is, I think, very clearly set out in a passage in Halsbury's Laws of England, 2nd ed., vol. 20, p. 264, to which we were referred: "The proviso for re-entry on non-payment of rent is regarded "in equity as merely a security for the rent, and accordingly, "provided that the lessor and other persons interested can be "put in the same position as before, the lessee is entitled to be "relieved against the forfeiture on payment of the rent and any "expenses to which the lessor has been put." In the footnote reference is made to *Stanhope* v. *Haworth*,[21] a decision of this court, where, the landlord having changed his position, it was regarded (as the court put it) as "monstrous" that the tenant should be entitled to relief.

Mr. Rochford, on behalf of the tenants, has drawn our attention to the fact that here and in many passages in the judgments this right to relief is referred to as a "right," as if it were an unfettered right; but the one exception to which I have already made reference shows that the right is not unfettered; and, indeed, section 210 of the Common Law Procedure Act, 1852, shows that the right to relief is (as it is described) a right to relief in equity.

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[20] [1931] 1 Ch. 60, 65.

[21] 3 T.L.R. 34.

That being the case, it must, I think, necessarily follow that, as equity reserves to itself the right to refuse relief in an appropriate case, the only remaining question is whether this is an appropriate case. I am confirmed in the view I have formed by the observations of Sir James Wigram V.-C. in *Bowser* v. *Colby*.[22] Although I respectfully agree with what has fallen from my brother Jenkins and with his reference to the fact that breaches of covenant have to be read in the light of the present requirements of notice since the Conveyancing Acts, Wigram V.-C. clearly had in mind that which I think the court must always keep in mind, that there may be cases where the court will refuse relief because the conduct of the applicant for relief is such as to make it inequitable that relief should be given to him. Particularly must that be so where his conduct is in relation to the premises in question—as in the instance which my brother gave, where a tenant is supposed to have been conducting the premises as a disorderly house; it could hardly be thought, I should suppose, in such a case, that the court would grant relief.

I need not address myself at length to the facts of this case: the judge has considered those. I think that the question of the tenants having been bad payers in the past, and the fact that they have been elusive when attempts have been made to serve them, are irrelevant matters for consideration, and the only material matter is the matter which is the subject-matter of the conviction. That was considered by the judge; he has considered it as an isolated matter and not as a continuous course of conduct. Upon that matter I think that this court would not interfere with the exercise of his discretion, and would not take such a severe view of the matter that it ought for that reason to deprive the tenant of that which, on the face of it, he would expect to get, namely, relief against forfeiture.

I therefore agree that this appeal fails, save in so far as it may be necessary to make a correction of the order to show that this court is dealing with this matter on the footing that the proceedings should cease rather than that relief should be granted.

SINGLETON L.J. I agree.

Appeal dismissed.

Solicitors: *Pettiver & Pearkes; Greene & Underhill.*

A. W. G.

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[22] 1 Hare 109, 130 et seq.

1956
Mar. 27.

Devlin J.

ROLPH *v.* MARSTON VALLEY BRICK CO. LTD.

Legal Aid—Costs—Taxation—Barrister or solicitor—Fees—Summons for review of taxation—Summons in assisted party's name—Jurisdiction to consider summons—Power to order taxation of costs of summons—Legal Aid and Advice Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 51), *s.* 3 (4)—*Legal Aid* (*General*) *Regulations,* 1950 (*S.I.* 1950, *No.* 1359) (*as amended*), *regs.* 8 (1) (*b*), 14 (3) (*c*), 18 (3) (*b*).

By regulation 18 (3) of the Legal Aid (General) Regulations, 1950 (as amended by the Legal Aid (General) (Amendment No. 1) Regulations, 1954 (S.I. 1954, No. 166), reg. 27), "Where in any "proceedings to which an assisted person is a party . . . (*b*) the "court gives judgment or makes a final order in the proceedings, "the judgment or order shall include a direction . . . that the "costs of any assisted person shall be" taxed as between solicitor and client in accordance with the Third Schedule to the Legal Aid and Advice Act, 1949.

A civil aid certificate under the Legal Aid and Advice Act, 1949, entitled a plaintiff, an infant, to legal aid as plaintiff in connexion with proceedings described on the certificate as "prosecuting an action . . . for damages for personal injuries, and to "enforce any order for costs." The action was compromised by the defendants consenting to judgment for £1,500 with costs, and the settlement was approved by an order of the court under which a certain sum was paid into court bearing a first charge under section 3 (4) of the Act and which contained a direction that the plaintiff's costs be taxed as between solicitor and client in accordance with the Third Schedule to the Act. On taxation the taxing master disallowed, both as against the defendants and in the legal aid taxation, certain items in the plaintiff's solicitor's bill of costs, amounting to £40 5s. (the greater part of which was concerned with the fees of counsel in connexion with a view of the scene of the accident). As between party and party the master's decision was accepted, but the solicitor, having obtained authority from the legal aid committee to lodge an interlocutory appeal under regulation 14 (3) (*c*) of the Legal Aid (General) Regulations, 1950, took out a summons for a review of taxation as between solicitor and client. The summons was dismissed. On an application for an order under regulation 18 (3) (*b*) directing that the costs of the summons be taxed under the Act of 1949:—

Held, that there was no power to direct that the costs of the summons be taxed under the Act of 1949, because:

(1) Under regulation 18 (3) (*b*) such a direction could only be included in a final judgment or order in the proceedings, and the order dismissing the summons was interlocutory and not a final order in the sense contemplated by the regulation.

In re Jerome [1907] 2 Ch. 145 applied.

(2) The proceedings were not "proceedings to which an assisted "person is a party" as required by regulation 18 (3) (*b*) for the

summons was not within the description of the proceedings set out in the civil aid certificate.

Brown v. *Brown* [1952] 1 T.L.R. 930; [1952] 1 All E.R. 1018 and *Page* v. *Page* [1953] Ch. 320; [1953] 1 All E.R. 626 distinguished.

Held, further, that it followed that the costs of the summons could not be taxed under the original order made in the action; and that the position was not affected by the authority from the legal aid committee under regulation 14 (3) (*c*), for that regulation dealt only with proceedings which were within the certificate; nor (since a matter in which a solicitor was seeking to have a review of the taxation of his bill against a client was wholly distinct from the action out of which the bill arose) could the position be affected by an amendment of the certificate by the committee under regulation 8 (1) (*b*), for any such amendment would be ultra vires.

Theocharides v. *Joannou* [1955] 1 W.L.R. 296; [1955] 1 All E.R. 615 considered.

Quaere whether there was jurisdiction to consider the summons at all because the solicitor could not have had authority from the assisted person to bring the summons, for, had it succeeded, a sum of money would have been deducted from the damages awarded to meet the additional fees and charges; the notion that the solicitor was still acting for his nominal client was a fiction of a sort against which the court had always set its face.

Observations on the relationship between a solicitor and a client who is legally aided.

Per curiam. The scheme makes no provision for any party being heard on the legal aid taxation except the solicitor himself, and the regulations say nothing about the costs of a taxation or of any appeal arising from it or of how they are to be borne. What is needed is some regulation dealing specifically with the aftermath of legally aided proceedings; until one is made the court is forced to deal with the situation quite unrealistically.

Summons for review of taxation.

An action for damages for personal injuries brought by an assisted person, an infant, under the Legal Aid and Advice Act, 1949, was compromised by an offer from the defendants to consent to judgment for the sum of £1,500 with costs. Jones J. approved the settlement and made an order under which a certain sum of money was paid into court bearing a first charge under section 3 (4) of the Act,[1] and which contained a direction that the plaintiff's costs be taxed as between solicitor and client in accordance with the Third Schedule to the Act. Included in the bill of costs brought in by the plaintiff's solicitor were certain items, amounting to £40 5s. concerned with the expense of a view by counsel of the scene of the accident, the greater part of which were composed of the fees of counsel. The taxing master disallowed those items and the solicitor objected to the disallowance. The taxing master refused to allow counsels' fees for the view, but allowed instead the costs appropriate to a double consultation. The solicitor, having applied for and obtained authority from the legal aid committee to lodge an interlocutory appeal under regulation 14 (3) (*b*) of the Legal Aid (General) Regulations, 1950, took out a summons under R.S.C., Ord. 65, r. 27 (41), for an order to review the taxation. At the conclusion of the hearing of the summons counsel applied for an order directing that the costs of the summons be taxed under the Legal Aid and Advice Act, 1949.

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[1] Legal Aid and Advice Act, 1949, s. 3: "(4) . . . any sums remaining "unpaid on account of a person's contribution to the legal aid fund in "respect of any proceedings and, if "the total contribution is less than "the net liability of that fund on his "account, a sum equal to the deficiency shall be a first charge . . . on "any property . . . which is recovered "or preserved for him in the proceedings. (5) The reference in the last "foregoing subsection to property recovered or preserved for any person "shall include his rights under any "compromise arrived at . . . and any "sums recovered by virtue of an order "for costs made in his favour in the "proceedings. . . . (7) References in "this section to the net liability of

The summons and the application were heard in chambers and adjourned into open court for judgment.

The facts are fully stated in the judgment.

John Ritchie in support of the summons.

March 27. DEVLIN J. read the following judgment: On March 9, 1953, the infant plaintiff, a girl then aged seven, was knocked down by the defendants' lorry when she was running across a road junction, apparently in answer to her mother's call. On April 10, 1954, the infant, acting through her father as next friend, obtained a civil aid certificate under the Legal Aid and Advice Act, 1949, entitling her to legal aid as plaintiff in connexion with proceedings that were described as follows: "by "her father and next friend, Mr. George William Rolph, prose- "cuting an action in the High Court of Justice, Queen's Bench "Division, against Messrs. Marston Valley Brick Co. Ltd. for "damages for personal injuries, and to enforce any order for "costs." The assisted person's contribution was assessed at £22 10s. On April 27, 1954, the writ was issued, and on October 18, 1955, the action was compromised by an offer from the defendants to consent to judgment for the sum of £1,500

"the legal aid fund on any person's "account in relation to any proceedings refer to the aggregate amount "of the sums paid or payable out of "that fund on his account in respect "of those proceedings to any solicitor "or counsel and not recouped to that "fund by sums . . . recovered by "virtue of an order . . . for costs."

with costs. The settlement was approved by an order of the court made by Jones J. whereby it was also ordered that, except for £25 paid direct to her father, £1,475 was to be paid into court, bearing a first charge under section 3 (4) of the Act of 1949; under this subsection the Legal Aid Fund has a charge which can be enforced so that they may recoup themselves for the full amount they have expended on costs for the benefit of the plaintiff; one likely cause of a deficiency, as in this case, is that the sum recovered from the defendant as party and party costs may be less than the amount expended as solicitor and client costs. The order also contains the usual direction that the plaintiff's costs, as well as being taxed against the defendant, are to be taxed as between solicitor and client in accordance with the Third Schedule to the Act.

The taxation duly took place and the items in the bill that have given rise to the matter now before me are items that are concerned with the expense of a view of the scene of the accident that was asked for by counsel in preparation for the trial. These items amount to £40 5s., of which the greater part is composed of the fees of leading and junior counsel amounting together to £37 10s. The taxing master disallowed these items both as against the defendants and in the legal aid taxation. The Masters' Practice Notes on costs (see the 1956 Annual Practice, p. 2848) state that a view by counsel will be disallowed as a rule. As between party and party the master's decision has been accepted, but the plaintiff's solicitor objected to the disallowance as between solicitor and client. One of the points made in the written objection was that the view had enabled a pre-trial conference with the infant and next friend to be dispensed with. The master, in his answer to the objection, while he adhered to his opinion that counsels' fees for the view must be disallowed, allowed instead the costs appropriate to a double consultation, that is, he reduced counsels' fees from £37 10s. for a view to £11 10s. for a consultation, so that to that extent the objection was met. The plaintiff's solicitor, being still dissatisfied, took out a summons under R.S.C., Ord. 65, r. 27 (41), for an order to review. This is the summons that is now before me. Before taking it out, the solicitor applied for and obtained authority from the legal aid committee to "lodge an interlocutory appeal" under regulation 14 (3) (*c*) of the Legal Aid (General) Regulations, 1950.

It is well established that a review will be ordered only if the master is shown to have erred in principle. Mr. Ritchie has put

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his case on this point in two ways. In the first place he submits that the practice note, to which I have referred, ought now to be reconsidered; it was made, he says, in 1902, and is now out of date; he also submits that the fact that not only junior counsel, but also leading counsel, thought a view to be necessary shows that it is a very exceptional case. These considerations do not satisfy me that the master has exercised his discretion wrongly. It is not disputed that he applied the right principle to a legal aid taxation which is, as he puts it, that "a rather more generous "view of the matter should be taken as between party and "party." There cannot be many running-down cases in which photographs and a plan are not sufficient for the judge and counsel to learn all that need be known about the scene of the accident. No doubt great weight should be given to the fact that the view was advised by both counsel, but the master said that he had given that point very careful consideration. I do not think that he has made any error of principle.

The other way that Mr. Ritchie put the point was to say that the master had no power to allow fees for a double consultation that was only a notional one; and the fact that he had purported to do so showed that he had exercised his discretion wrongly about the view. I should like to hear the question of the master's power—Mr. Ritchie says it depends upon the construction of R.S.C., Ord. 65, r. 27 (29)—argued on the other side before making up my mind about it. But even if Mr. Ritchie is right, I do not think that the point helps him. If Mr. Ritchie's case was that while the master had power to do it, he ought not as a matter of discretion to have done it, I could see the force of the point; it might then be said that his discretion in relation to the whole of this matter was unreliable. But that is not said. If the master had power to do it, it seems to me to be a very sensible way of trying to do justice. If the master was trying to do justice in a sensible way, the fact that he misconstrued his power to allow a double consultation is not, to my mind, any indication that his discretion about the view was wrongly exercised.

When Mr. Ritchie had concluded his submission, I told him that for reasons of this nature I would dismiss the summons. Mr. Ritchie then asked for an order directing that the costs of the summons should be taxed under the Legal Aid and Advice Act, 1949. It appears that there has been a number of these cases in which solicitors have appealed from disallowances by the taxing master under a legal aid taxation, and that the order for which Mr. Ritchie asks has generally been made without question. It seemed to me, however, to be an odd order to make in the circumstances, and I therefore adjourned the matter so that Mr. Ritchie could direct me to the detailed provisions of the Act which entitled him to have it. At the adjourned hearing he argued the matter before me very fully, and I have obtained the greatest possible help from his submissions; as no other party was represented, he had the difficult task of trying to put the matter on both sides. He said that the position under the scheme had puzzled those who have to administer these provisions of it, and that they would welcome a ruling. I therefore reserved my judgment, and it is for that reason that I am delivering it in open court.

I shall begin by making a general observation. The framers of the legal aid scheme do not seem to me to have considered sufficiently the results that follow from imposing its provisions upon the ordinary relationship of solicitor and client. In ordinary litigation a solicitor's position about his bill is not fundamentally different from that of any other professional agent. He does the work which his client instructs him to do and is entitled to be paid for it accordingly; the only unusual feature of it is that if his bill is not acceptable to his client the dispute is settled by the taxing master instead of by a judge or a referee. In legally aided litigation this position is altered in at least three major respects. First, the scope for agreement between solicitor and client is strictly limited. Secondly, the possibility of a dispute between the solicitor and his client about the amount of his remuneration hardly seems to have been contemplated, and there is no proper machinery for resolving it. Thirdly, he is not himself in any way responsible for the fees of counsel whom he instructs; they are not entitled to be paid more than what is allowed on taxation less 15 per cent. This last distinction is simply stated; the other two need to be elaborated a little further.

First, who for this purpose is the client? The person who actually pays the solicitor for his services is the Legal Aid Fund; the fund is not, of course, a legal entity; it is administered or protected by various bodies under the scheme, but for the purpose of this judgment, I can treat them collectively as the fund. The fund alone is in law responsible for the solicitor's bill and the lay client's contribution, if any, goes into the fund and not direct to the solicitor. But the fund's capacity for agreeing to special expenditure of the kind for which a solicitor usually asks for special instructions from his client is limited to the matters set out in regulation 14 (3). These include, as I have stated, the lodging of interlocutory appeals, but not giving instructions for a view. When the solicitor's bill is finally presented, the fund cannot, like the ordinary client, accept it without demur. There must be a taxation; and the Act provides in Schedule III, paragraph 4, that it shall be conducted "according to the "ordinary rules applicable on a taxation as between solicitor and "client where the costs are to be paid out of a common fund "in which the client and others are interested: Provided that no "question shall be raised as to the propriety of any act for which "prior approval was obtained as required by regulations."

I have said that the fund is alone responsible in law for the bill. But the fund is not always the only person interested because it is not always the only person upon whom the whole bill will ultimately fall. Of course, if the legally aided litigant is successful, the party and party costs will normally be recovered from the losing party. But to the extent that they are not so recovered or to the extent that the solicitor and client costs exceed the party and party, and always in the case of an unsuccessful litigant, the bill or a part of it may ultimately fall either on the fund or on the lay client. Generally speaking (unless, for example, the client's contribution is exceptionally high), in the case of an unsuccessful litigant the bill will fall on the fund. Also, generally speaking (unless, for example, the amount recovered in the action is exceptionally low), in the case of a successful litigant that part of the bill that is not recouped from the other party to the action will fall on the lay client and will be discharged out of the damages or other property recovered in the action. The facts of this case bring it into the latter category. If the summons had succeeded, £40 would therefore have been deducted to meet the additional fees and charges from the £1,500 damages awarded to the infant plaintiff. There is no option on this point; under regulation 16 (6) (*b*) the deduction is mandatory. Thus in this case—and in this respect it is not exceptional—the client is on one side and the solicitor on the other; if he wins, she loses.

Now the scheme makes no provision for any party being heard on the legal aid taxation except the solicitor himself. It treats the taxation as if it were a piece of machinery into which the bill is inserted and from which it emerges quite correct. It does not seem to treat it as an adjudication on which two opposing contentions may have to be advanced, argued and determined. Consequently, the regulations, except in one respect which I note below, say nothing about the costs of a taxation or of any appeal arising from it or of how they are to be borne.

So far as the fund is concerned, I suppose the intention is that it should be made to submit to whatever order the master or judge thinks fit to make. This seems to me to place a heavy burden upon the master or judge (particularly the latter, since he is treading on unfamiliar ground) and also upon counsel who has to try to put both sides fairly to the court. Comment has already been made on this by Sachs J. in *Self* v. *Self*,[1] and by Harman J. in *Theocharides* v. *Joannou*.[2] But apart from the burden put on the court no other difficulty necessarily arises. The fund may be the solicitor's paymaster, but it is not his client; the solicitor is entitled to press his case for payment from the fund and if the fund cannot be represented, that is the fund's misfortune. But where the lay client is going to pay, the position seems to me to be entirely different. The solicitor is at once subjected to a conflict between his own interest and his duty to the client in whose name he is still acting. In ordinary life he would at once go to his client and tell him he must place his affairs in other hands. It shows the artificiality of the arrangements made under the scheme that it has obviously never occurred to the experienced firm of solicitors instructing Mr. Ritchie that that would be the proper thing to do. But if a solicitor does not do it, he may find himself sued by his client for breach of duty. If, on the other hand, he does do it, the curious result might follow that the client applied for a fresh grant of legal aid to fight his former solicitor. I draw attention to that because it throws a light on the problem I have to consider. If the client got a new certificate, could his old certificate conceivably be regarded as still covering his former solicitor? Yet if the lay client is not heard, injustice may easily result. The present case affords an example. The master, as I have said, allowed £11 10s. for a consultation instead of a view. If Mr. Ritchie is right, he had no power to do so. But there is no one on the client's behalf to take that point or to ask for a review, and so it may be that a sum will be deducted from her damages which ought not to be deducted.

As to the costs of the taxation and of appeals arising out of it, the scheme, as I have said, makes little or no express provision. In regulation 18 (3) three cases are specified in which an order or direction for a legal aid taxation is to be made. In the last of them, which is not this case, it is expressly provided that the cost of the "taxation shall be deemed to be costs in the proceedings to which the certificate relates." I do not know what is the right inference to be drawn from the silence of the regulation on this point in the other two cases. In practice, the solicitor is allowed his costs of the taxation, and I daresay that this follows from the direction in the third schedule that the taxation is to be "according to the ordinary rules." Those rules provide for how the costs of the proceedings before the master are to be borne, but they do not provide for any costs which are in the discretion of the judge; about these the scheme says nothing.

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[1] [1954] P. 480, 483; [1954] 2 All E.R. 550.

[2] [1955] 1 W.L.R. 296, 298; [1955] 1 All E.R. 615.

I have set out these general considerations because they show that the problem I have to answer has to be presented to me quite artificially and that it arises from the omission to make proper provision for the sort of situation I am now considering and in particular for the situation in which the lay client may be financially interested. Harman J., in *Theocharides* v. *Joannou*,[3] foresaw the situation and said it would create "a very extraordinary state of things," as indeed it does. Let me look at the reality of it, which can only be seen if the proceedings before me are stripped of several layers. In form they arise because a solicitor is aggrieved by a deduction of £40 from his bill. But in fact, since the solicitor is not responsible for counsels' fees, he has suffered by the deduction a loss of only about £2 and no solicitor would bother about that. The proceedings are therefore brought mainly for the benefit of counsel; and so when the outer layer is removed, the summons is seen as a proceeding in which the professional advisers of the infant plaintiff are asking in her name, but without the knowledge or approval of herself or her next friend, that a part of their fees be paid out of her estate. But that is not quite the true position either. I am told that, as one might expect, counsel and solicitors do not concern themselves personally about these points. What happens is that decisions of this sort given on taxations, when they are thought to involve points of principle, are reported to the Bar Council and the Law Society. These bodies very properly make it their business to see that decisions establishing principles which may be adverse to the general interests of the profession do not go unchallenged. In this case, since the decision affects the Bar more than the Law Society, it was the Bar Council which decided that it should be challenged; they have sought to establish that the present practice relating to the costs of a view is too rigorous. Thus in the end it is the Bar Council that turns out to be the real litigant. From time to time the operation of this beneficent scheme has accidentally produced some odd recipients of legal aid, but nothing quite so odd, I think, as the Bar Council or the distinguished counsel who were engaged in this case. What is needed is some regulation dealing specifically with the aftermath of legally aided proceedings. Until one is made the court is forced to deal with the situation quite unrealistically.

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[3] [1955] 1 W.L.R. 296, 299.

There are three possible grounds for dismissing this application. The first is that it ought not to have been entertained at all on the ground that the solicitor is acting without the authority of the client in whose name he purports to act. The second is that I have no power to give the direction asked for because I am not making a final order in any proceedings. The third is that the proceedings now before me are not proceedings to which an assisted person is a party.

I do not propose to refuse the application on the first ground because the point was not investigated in the argument before me and I have not therefore got any specific information about the nature of the solicitor's retainer. As I intend to refuse the application on the other grounds I have not felt it necessary that the expense should be incurred of inviting a further argument from Mr. Ritchie on the first point. But I think that probably I ought to have dismissed the summons at the outset without going into the merits of it at all. It is brought by the solicitor in the name of the assisted person. But the solicitor cannot possibly have authority from the assisted person to bring this summons. He could not be heard to say that she was his client, for, if she was, he would be acting in breach of duty towards her by seeking to obtain money from her estate partly for his own benefit. When the court becomes aware that a solicitor is acting without authority, I think that the court should act of its own motion and refuse to grant relief: see *Daimler Co. Ltd.* v. *Continental Tyre & Rubber Co. (Great Britain) Ltd.*,[4] *per* Lord Parker of Waddington.[5] That was a different type of case from this, but I think that the principle is of general application and certainly should be applied in a case where the relief would affect an infant plaintiff who is unrepresented. The fact is that the notion that the solicitor is still acting for his nominal client is a

[4] [1916] 2 A.C. 307; 32 T.L.R. 624.

[5] [1916] 2 A.C. 307, 337.

fiction that is maintained so that the legal aid scheme may still be made applicable. But the court has always set its face against fictions of this sort: see *Adams* v. *Naylor.*[6]

Before I deal with the next two grounds I must mention *Brown* v. *Brown*[7] and *Page* v. *Page*,[8] so as to show that I have not overlooked these decisions of the Court of Appeal. I understand that the order that I am now asked to make has upon some occasions been made without question because it has been supposed that in the light of those decisions the judge had no power to do otherwise. Such a supposition would, I respectfully think, be based upon a misconception of those cases. They make it plain that the judge is in no sense a court of appeal from the decision of the committee granting legal aid. If a civil aid certificate embodying such a decision is produced, the judge has no discretion which will enable him to inquire into the merits of the matter and to consider whether legal aid ought or ought not to have been granted. But unless such a certificate is produced the judge cannot act; and if what is produced is an invalid certificate, for example, because it is ultra vires the body purporting to grant it, the position is no better than if no certificate is produced at all. The judge is not required to make an order merely because he is told it is a legal aid case or because a bit of paper is put in front of him; he must satisfy himself that he is dealing with proceedings to which an assisted person is a party; and I do not think that *Brown* v. *Brown*[9] or *Page* v. *Page*[10] decides anything to the contrary of that. There is no doubt that the relevant words in the Act are mandatory and that the judge is given no discretion; but that does not absolve him from the duty of satisfying himself that the order he is asked to make is one that falls within the mandate.

I therefore turn first to the section of the regulations under which, Mr. Ritchie says, I am required to give the direction. This is regulation 18 (3) (*b*) and, omitting immaterial parts, it provides as follows: "Where in any proceedings to which an "assisted person is a party . . . (*b*) the court gives judgment or "makes a final order in the proceedings, the judgment or order "shall include a direction . . . that the costs of any assisted "person shall be . . . [taxed as between solicitor and client in "accordance with the provisions of the Third Schedule]." Before

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[6] [1946] A.C. 543; 62 T.L.R. 434; [1946] 2 All E.R. 241.

[7] [1952] 1 T.L.R. 930; [1952] 1 All E.R. 1018.

[8] [1953] Ch. 320; [1953] 1 All E.R. 626.

[9] [1952] 1 T.L.R. 930.

[10] [1953] Ch. 320.

I can give the direction I must therefore be satisfied of two things. First, that the proceedings before me are "proceedings "to which an assisted person is a party"; and secondly that I am giving judgment or making a final order in those proceedings.

It is convenient to take the second point first as it is the shorter one. In one sense a court gives judgment whenever it arrives at any adjudication, whether the proceeding is interlocutory or final. But it is plain that the word "judgment" is not used in that sense for it is not intended that whenever at any stage of an action a judge has made a pronouncement upon some aspect of it he should order an immediate taxation. The distinction is between final judgments and orders and interlocutory judgments and orders. Into which of these two categories does the order that I have made dismissing this summons for review fall? This question placed Mr. Ritchie in something of a dilemma. As I have already said, those instructing him had obtained authority from the legal aid committee to bring the summons for review on the basis that it was an interlocutory appeal. Mr. Ritchie cited on this point *In re Jerome,*[11] in which the Court of Appeal decided that an order dismissing a summons to review a taxation of a solicitor's bill of costs under the Solicitors Act, 1843, was not final, but interlocutory. I think that I am bound by this authority to reach the same conclusion and accordingly on this short ground I find myself without power to make the order for which Mr. Ritchie asks.

A decision on this short ground would leave it open to Mr. Ritchie's clients (whoever they may be) to take two alternative steps. The first and most logical one would be to treat this matter as interlocutory and therefore as one which does not require an order for taxation; they should go back to the taxing master and invite him to treat it as an interlocutory matter which is proleptically covered by the final order made by Jones J. The other is to invite the committee to amend the certificate so as to include within its scope the summons for review. If I had thought that either of these courses would assist Mr. Ritchie, I should have allowed an adjournment for the necessary steps to be taken, as I should not wish a matter of this importance to be decided merely on the footing that the wrong regulation had been invoked. I have, however, reached the conclusion that neither of these courses would improve Mr. Ritchie's position, and I shall state my reasons for it.

The taxing master has no jurisdiction to tax unless it is given to him by an order or direction made under regulation 18 (3). If the order of Jones J. is relied on for this purpose, the taxing master must satisfy himself that the proceedings he is asked to tax are within the order. Even if the order of Jones J. can be construed as covering proceedings which had not then taken place, it could not cover this summons for review. The jurisdiction of Jones J. under the regulation I have already quoted was limited to "proceedings to which an assisted person is a "party." The proper way of finding out whether any set of proceedings falls within that description is to call for the legal aid certificate and look at the description set out on it. The certificate in this case describes the proceedings as an action by the infant plaintiff "for damages for personal injuries, and to "enforce any order for costs." A summons for a review of a solicitor and client taxation cannot come within that description; and, of course, the assisted person is not a party to them at all, or at least not a party in the sense that the certificate contemplates. The position is not improved by the letter from the Legal Aid Committee under regulation 14 (3) (*c*) authorizing as an interlocutory appeal the bringing of the summons for review; for that regulation is plainly dealing only with proceedings that are within the certificate. Accordingly, an application to the taxing master to tax the costs of this summons under the order of Jones J. would, in my opinion, be fruitless.

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[11] [1907] 2 Ch. 145.

The alternative step is to amend the certificate to include in the proceedings therein described the summons for review. The power to amend is contained in regulation 8 (1) (*b*) and, if it could be validly exercised in relation to this summons, then the only point in this case would be purely procedural, namely, that the committee had issued a letter under regulation 14 (3) (*c*) instead of making an amendment under regulation 8 (1) (*b*). But in my opinion such an amendment would not be valid. I have been told that in the past a certificate amended in this way has been acted upon; and in particular I was reminded that in *Theocharides* v. *Joannou* [12] Harman J., although apparently he was doubtful about the position, gave effect to an amended certificate.[13] "I propose to make the usual order for taxation of "the applicant's costs under the Legal Aid and Advice Act, he "having, rightly or wrongly, got a certificate covering this "application." But the point was not argued before him, he did not inquire into it and I do not believe he would regard himself as having given a final and considered decision on it. I think,

[12] [1955] 1 W.L.R. 296.

[13] Ibid. 303.

therefore, that I ought to reach my own conclusion. Regulation 5 (2) provides that "A certificate shall not relate to more than "one action, cause or matter"; and regulation 8 (1) (*b*) provides that a certificate may be amended "to extend to other proceed-"ings, being part of the same action, cause or matter to which "the certificate relates." In my judgment a matter in which a solicitor is seeking to have a review of the taxation of his bill against a client is one that is wholly distinct from the action out of which the bill arises; and so an amendment which included the summons for review would be ultra vires.

On these grounds I refuse the application for an order that the applicant's costs be taxed under the Legal Aid and Advice Act, 1949. I shall, if it is asked for, give leave to appeal from my refusal. I shall also, if it is asked for, enlarge the time for entering notice of appeal so that there may be an opportunity for deeper reflection than usually has to be given to the matter of an interlocutory appeal. The infant plaintiff will not be hurt by any delay; she will not be kept out of her money, since it has to remain as a fund in court even after the charge under the Act has been removed.

The need for reflection is because the Bar Council may have allowed itself to get into a position that it does not really wish to occupy. When one is concerned with the daily administration of a scheme such as this and is searching the statutes and regulations for solutions to puzzling problems, there is a danger that, as one moves from subsection to subsection, one may keep one's eyes too closely on the track and lose a wider view. If those who are concerned in these matters will now pause and look around from the place they have got to, they may find that it is not one in which they wish to remain. Whether my judgment on the law is right or wrong, it cannot, I feel, be consistent with the dignity of a great profession that, having attempted very properly to obtain in favour of its members a decision on a point of principle and failed, it should wish to be reimbursed the costs of the unsuccessful attempt either out of a public fund provided for necessitous litigants or out of a sum awarded to an infant in compensation for her injuries.

Summons dismissed. Application for order for taxation of costs dismissed. Leave to appeal. Extension of time in which to appeal.

Solicitors: *Cliftons.*

J. F. L.

C. A.

1956
Feb. 24.

Lord Evershed M.R., Singleton and Parker L.JJ.

UNITED MOTOR FINANCE CORPORATION LTD. *v.* TURNER AND ANOTHER.

[1955 L. No. 65.]

Hire-purchase — Hire-purchase agreement — Practice — Proceedings against hirer for recovery of hired goods "commenced," on filing of praecipe—Hirer not served with summons—Whether "made" party to action by being named as defendant in praecipe—Attempt to continue action against guarantor alone—Hire-Purchase Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 53), *s.* 12 (1) (2).

Practice—Parties—Joinder.

By section 12 (1) of the Hire-Purchase Act, 1938, where action for the recovery of the hired goods has been "commenced" the "owner shall not take any steps to enforce payment of any sum "due under the hire-purchase agreement or under any contract of "guarantee relating thereto, except by claiming the sum in the ". . . action," and by subsection (2), "all the parties to the "agreement and any guarantor shall be made parties to the action."

The owners of a motor-bicycle, the subject of a hire-purchase agreement, terminated the hire in accordance with the terms of the agreement and began proceedings in the county court, naming as defendants the hirer and his father, who had signed a contract of guarantee. The summons was not served on the hirer. The particulars of claim included a claim for the recovery of the hired goods, but the owners did not proceed with that claim and sought to rely exclusively on the claim against the guarantor under the contract of guarantee:—

Held, that proceedings for the recovery of the motor-bicycle had been "commenced" within the meaning of section 12 (1) of the Hire-Purchase Act, 1938, at the moment when the praecipe was filed in the court office and a plaint came into existence; but that the hirer, though named as a party to the proceedings, had not thereby in the absence of service been "made" a party to the action as required by section 12 (2), and, accordingly, the owners could not proceed.

APPEAL from Judge Braund sitting at the New Mills and Buxton County Court.

By a hire-purchase agreement dated July 3, 1954, the United Motor Finance Corporation Ltd., hereafter called "the owners," agreed to let a motor-bicycle on hire to George Edward Turner of Cadster Wood, Whaley Bridge, Derbyshire (hereafter called "the hirer"). The terms agreed included a provision that the hirer would "return the vehicle to the owners forthwith upon "the expiration or determination of the hiring unless purchase "has been completed under this agreement," and that, "if the "hirer shall fail so to do the owners may thereupon retake "possession of the vehicle wherever it may be found." The agreement further provided that upon the happening of certain events, including failure by the hirer to make punctual payment of any sum payable under the agreement, the owners might "determine the hiring either by notice in writing to the hirer or "by retaking possession of the vehicle without notice."

On the same day, John Turner, the father of the hirer, and of the same address, executed a contract of guarantee in favour of the owners.

The total hire-purchase price of the bicycle was £138 2s., but with the exception of an initial payment of £48 12s., which was paid on completion of the agreement (which sum exceeded one-third of the purchase price), no payments for the bicycle were made either by the hirer or by the father, hereafter called "the "guarantor," on his behalf.

By notice in writing dated April 1, 1955, the owners terminated the hiring and asked the hirer to let them have "an "appointment" where they might resume possession of the motor-bicycle. No reply was received by the owners and they began proceedings in the county court, naming as defendants the hirer and the guarantor. By the particulars of claim dated June 2, 1955, after setting out the history of the matter, the owners alleged that the right to recover possession of the motor-bicycle had arisen and they sought return of the article, or, alternatively, payments of certain sums totalling £91 7s. 6d. They also claimed as an independent claim against the guarantor under the guarantee the sum of £91 7s. 6d. which they said represented his liability in the circumstances under the contract of guarantee.

On June 9, 1955, the summons was served on the guarantor, but it was not at any time served on the hirer, nor did he at any time submit to the jurisdiction of the court. He was then, and apparently thereafter, serving as an airman on the continent of Europe.

At the hearing before the county court judge, the owners did not proceed with the claim against the hirer but sought to proceed with the claim against the guarantor. The county court judge held that the action was "an action to recover possession "of the goods from the hirer" within section 12 (1) of the

Hire-Purchase Act, 1938[1] (which, by section 1 (2) of the Hire-Purchase Act, 1954,[2] and section 20 (3) of the Act of 1938 was applicable to the agreement in question); that action had been "commenced" as soon as the plaint came into existence on the filing of the praecipe in the court office; that the owners could not, however, proceed under the contract of guarantee because the hirer had not been "made" a party to the action as required by section 12 (2) of the Act of 1938. Accordingly, the county court judge non-suited the owners, who now appealed.

D. J. Ackner for the owners. The owners can proceed in the existing action against the guarantor alone. By section 12 of the Hire-Purchase Act, 1938, where an action to enforce recovery of hired goods has been commenced, as in the present case, there shall be brought before the court all the parties to the agreement and any guarantors. Section 12 is, however, only concerned with the position where, pursuant to section 11, an owner is seeking to enforce his right to recover possession against the hirer, and there is nothing in section 12 or any other section which precludes the owner from claiming directly against a guarantor under the contract of guarantee; and if the owner chooses to proceed against him alone, section 12 has no application.

Since the object and purpose of section 12 is to protect the hirer, and it is not concerned with the guarantor, there is nothing offensive to the intention of the section if the owners, instead of suing the guarantor under the contract of guarantee, join him as a defendant to the action for recovery of possession of the hired goods, and then abandon the issue of possession and proceed against him alone. If the legislature had intended that a guarantor was never to be sued except in the company of the hirer, it could easily have said so.

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[1] Hire-Purchase Act, 1938, s. 12 (1): "Where, in any case to which "the last foregoing section applies, "an owner commences an action to "enforce a right to recover possession of goods from a hirer . . . the "action shall be commenced in the "county court for the district . . . and "after the action has been commenced "the owner shall not take any step "to enforce payment of any sum due "under the hire-purchase agreement "or under any contract of guarantee "relating thereto, except by claiming "the sum in the said action. (2) Subject to such exceptions as may be "provided for by county court rules, "all the parties to the agreement and "any guarantor shall be made parties "to the action."

[2] Hire-Purchase Act, 1954, s. 1: "(1) The hire-purchase agreements "and credit-sale agreements to which "the Hire-Purchase Act, 1938, applies "shall include—. . . (*b*) any . . . "agreement under which the said price "does not exceed £300. . . . (2) In "relation to agreements of a class to "which the said Act applies by virtue "only of this section, section 20 of "that Act (which makes provision for "a limited application of that Act "to hire-purchase agreements made "before the commencement of that "Act) shall apply as if for any reference therein to the commencement "of that Act there were substituted a "reference to the commencement of "this Act."

If an action for the recovery of possession has been commenced against the hirer, then he is a party to that action, for the commencement of an action in the county court involves naming the parties to it, though commencement falls short of service of the proceedings on any person named. Naming a person as a party is sufficient to make him a party for the purpose of section 12 (2); it is not necessary for that purpose that he should be served or be a party to the judgment or to any issue which is tried. That a person named on the documents which are issued is a "party" is implicit in the county court rules: see Ord. 5, rr. 4, 5.[3] If a person named as a defendant to an action who has not been served should come forward at the hearing, he would be recognized as having a right to be heard; as being, in other words, a "party" to the proceedings. [Reference was also made to Ord. 6.[3]] The definition in section 191 of the County Courts Act, 1934,[4] of "party" supports that argument. When the writ has been issued and filed the court can say that an action has been commenced between the plaintiff and the defendant, but unless the defendant is a party there could be no action. It is, however, conceded that if no one is named on the summons there would be no parties prior to service, because one could not know by looking at the documents against whom the proceedings had been commenced.

If the hirer has not been made a party to the action, then an action to recover possession of the goods has not been commenced,

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[3] County Court Rules, 1936, Ord. 5, r. 4: "The plaintiff may at his "option join as parties to the same "action all or any one of the persons "severally or jointly and severally "liable on any one contract."

Rule 5: "Where the plaintiff is in "doubt as to the persons from whom "he is entitled to redress, he may "join two or more defendants so that "the question which is liable, and to "what extent, may be determined as "between all parties."

Ord. 6, r. 1: "Subject to the "provisions of any Act or Rule, all "proceedings authorized to be brought "in a county court . . . shall be "brought by action and shall be commenced by plaint."

Rule 3: "(1) In an ordinary or "default action, the plaintiff shall file "in the court office—(*a*) a praecipe ". . .".

. Rule 8: "(2) The title of the "action or matter shall contain the "name of the court . . . and the distinguishing number and the names "of the parties, and shall be borne "by every document filed, issued or "served in the course of the proceedings."

[4] County Courts Act, 1934, s. 191: "(*p*) 'Party' includes every person "served with notice of, or attending, "any proceeding, whether named as "a party to that proceeding or not. ". . ."

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and the owners are entitled to recover against the guarantor on the footing that the existing action is an action against the guarantor simpliciter.

If the view taken by the county court judge is right, it would mean that once an action for the recovery of the hired goods has been commenced the owner, if the action for recovery was for any reason abandoned, would be for ever prevented from proceeding against the guarantor. There might be good reasons for abandoning the claim against a hirer even after the hirer had been served; for example, the hired goods might have been destroyed after the hirer had been served. It is possible in the present case that the hirer could have been found and served, but cases may well arise where, after the action for recovery has been commenced, it is found to be impossible to effect service on the hirer, and, therefore, impossible to comply with section 12 by making him a party. In such cases, if the submission of the defendants is correct, the owners would be debarred from all remedies.

If there is any ambiguity in the construction of section 12 it should be construed in favour of the owners, for this is an Act which cuts down their common law rights. [Reference was also made to *In re Evans, Evans* v. *Noton.*[5]]

R. G. Dow for the guarantor. If the owners were unable to serve the hirer, they should have discontinued the action for recovery of possession of the hired goods and sued the guarantor alone. [Reference was made to *Gillooly* v. *Gillooly*[6] and *Robinson* v. *Geisel.*[7]] The owners are not disabled from taking that course now, for no proceedings have been commenced for the recovery of the hired goods. But once such proceedings have been commenced, section 12 requires that an owner must pursue all remedies available to him in that action and all the persons who might be interested must be made parties. To make a person a "party," the proceedings must be brought to his attention by service. For the purpose of section 12, there is a material distinction between naming a person a party and making him or her a party in the relevant sense. There are, of course, many other possible meanings of "party" and the word is used in a different sense in the County Court Rules. Here the hirer has only been named and not made a party.

By Ord. 15, r. 11, a person named and appearing can be made a party by order of the court if the plaintiff has consented. This indicates that he was not previously a party.

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[5] [1893] 1 Ch. 252; 9 T.L.R. 108.

[6] [1950] W.N. 524; [1950] 2 All E.R. 1118n.

[7] [1894] 2 Q.B. 685; 10 T.L.R. 567.

Ackner replied.

LORD EVERSHED M.R. The unusual question which is raised in this appeal turns upon the effect of sections 11 and 12 (and more particularly the latter) of the Hire-Purchase Act, 1938. The present proceedings were commenced (I use that word deliberately, as will later appear) by the owners of the hired goods by plaint, followed by particulars of claim, in the county court, two persons being named as defendants to the proceeding, George Edward Turner, the hirer, and his father, John Edward Turner.

[His Lordship referred to the facts and continued:] The owners have said that they are content to treat the case as abandoned for practical purposes against the hirer and not to proceed with their claim to recover possession of the motor-bicycle. They seek to rely exclusively upon their contract with the guarantor.

The sole question which we have to decide is whether, having regard to the two sections which I have mentioned, the owners are disabled from taking that course.

The Hire-Purchase Act, 1938, in its original unamended form, would not have applied to this transaction at all. But by virtue of the Hire-Purchase Act, 1954, the terms of sections 11 and 12 are, as Mr. Ackner has conceded, indubitably applicable to this case and this matter.

Section 11 (1) provides: " Where goods have been let under " a hire-purchase agreement and one-third of the hire-purchase " price has been paid . . ."—which is this case—" the owner " shall not enforce any right to recover possession of the " goods from the hirer otherwise than by action." In other words, it is not open to an owner in the cases stated to recover possession by seizure; it must be done by action; and I think it may be said that the plain object of Parliament is to put into the hands of the court a measure of control over the owner's rights as against the hirer. Section 12 provides: " (1) Where, in any case to which the last foregoing " section applies "—as in this case—" an owner commences an " action to enforce a right to recover possession of goods from a " hirer . . . , the action shall be commenced in the county " court for the district "—then the appropriate district is defined—" and after the action has been commenced the owner " shall not take any step to enforce payment of any sum due " under the hire-purchase agreement or under any contract of "guarantee relating thereto, except by claiming the sum in the "said action. (2) Subject to such exceptions as may be provided "for by any county court rules, all parties to the agreement and "any guarantor shall be made parties to the action. . . . (4) On "the hearing of the action the court may, without prejudice to "any other power—: (*a*) make an order for the specific delivery "of all the goods to the owner, or (*b*) make an order for the "specific delivery of all the goods to the owner and postpone "the operation of the order on condition that the hirer or any "guarantor pays the unpaid balance of the hire-purchase price "at such times and in such amounts as the court . . . thinks "just . . . or (*c*) make an order for the specific delivery of a part "of the goods to the owner and for the transfer to the hirer of "the owner's title to the remainder of the goods."

I have read those subsections because they seem to me, as they appeared to the county court judge, to emphasize what I have already stated to be the Parliamentary intention to be discerned in this section, namely, to give a considerable measure of control to the court where the question of the enforcement of hire-purchase contracts arises.

The question which we have to determine turns upon the particular language of section 12 (2): "Subject to such exceptions as may be provided for by county court rules, all parties "to the agreement and any guarantor shall be made parties to "the action."

The first question which arose before the county court judge, and which has also been intimated here, is whether, within the language of section 12 (1), the action to recover possession of goods from the hirer has been "commenced." The county court judge was of opinion that in this case the condition was satisfied. He pointed out that, according to the County Court Rules, 1936, and Ord. 6 in particular, the commencement of an action or proceeding in the county court is by way of filing a praecipe, and, following the steps there laid down, "commencement" stops short of any service of the proceedings on any person named. I have no doubt in my mind that the view in this respect of the county court judge was entirely correct. I think that once the necessary steps had been taken which resulted in the emergence of a plaint bearing the letter and number "L 65," the action had been "commenced." Mr. Ackner, in truth, did not, with any force at any rate, contest that conclusion.

Mr. Ackner's real case has been that for the purposes of section 12 (2) the commencement of the action also carried with it the making of the persons named "parties" to that action; from which he argued that, since the hirer was named as a defendant in the action, he was made a party to the action, so that subsection (2) is satisfied, and jurisdiction is conferred upon the court to make an order against the guarantor for payment of the sum claimed or such other sum as should be found to be due. The county court judge rejected that contention and, in my judgment, rightly so. It seems to me that, in the context in which subsection (2) is found, the formula "shall be made "parties to the action" must be interpreted as meaning "shall "be made effectively parties to the action": that is to say, so that the person so named should be subject to the court's jurisdiction, and so that the court could exercise such of the powers, for example, which I have already read from subsection (4). Were it otherwise, it would appear to me that the intended requirement of this section would be a brutum fulmen. Escape from it could always be achieved by the mere mechanical act of naming persons in the proceedings as parties and then taking no steps whatever to bring the proceedings to their attention. I agree with Mr. Ackner that, when one speaks of "a party to an action," it may well be said in certain contexts that the phrase will include or mean a person who is merely named as a party. But in the context of this section, and having regard to what I have already referred to in subsection (4), I think that making the persons specified parties to the action is something other than merely naming them; they must be made effectively parties by service or by taking such steps by way of substituted service as will have the same effect.

Mr. Ackner suggested that if the view which commended itself to the county court judge and which commends itself to me were right, one curious result would arise which could not, he thought, be contemplated. Let it be supposed, said Mr. Ackner, that an action is started against a hirer and a guarantor, and then for some good reason is discontinued. According to Mr. Ackner, it would then be impossible, according to the strict wording of the section, for the owner ever to obtain any remedy against the guarantor. It is not necessary for us to decide this question. Suffice it to say that I am not prepared, as at present advised, to accept that such a conclusion would follow from the view which the judge took. I think that Mr. Ackner is probably right in saying (although this again must be treated as an obiter dictum on my part) that an owner could start proceedings against a guarantor alone by an action in which he would not claim to

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enforce any right of recovery of possession. But in this case the action which the owners brought was an action to enforce the right to recover possession, since, as the judge pointed out, that was the first of the claims actually made in the particulars. Such an action having been commenced, it therefore follows under section 12 (1) that the claim against the guarantor must be a claim made in the action, and also, as I think, by virtue of subsection (2), that all the parties to the transaction, including the guarantor, must be "made parties," that is, as I interpret it, "effectively made parties" to the proceedings.

For those reasons I conclude that the county court judge rightly held that the owners could not recover in these proceedings, and I think that this appeal must be dismissed.

Singleton L.J. I agree.

Parker L.J. I also agree.

Appeal dismissed.

Solicitors: *Duthie, Hart & Duthie; Wilfrid Taylor & Hindle, Manchester.*

E. D.

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1956
Mar. 8, 9, 23.

Denning, Morris and Parker L.JJ.

GILBERT (VALUATION OFFICER) *v.* S. HICKINBOTTOM & SONS LTD.

Rates and Rating—Hereditament—Meaning—Mechanized bakery and repair shop on opposite sides of street—Proximity of repair shop necessary for proper working of bakery—Whether one or two hereditaments—Considerations to be taken into account—Rating and Valuation (Apportionment) Act, 1928 (18 & 19 *Geo.* 5, *c.* 44), *s.* 3 (2) (3).

Ratepayers owned and occupied premises on opposite sides of a street, those on the south being a large mechanized bakery and those on the north being used as a depot for the repair and maintenance of the delivery vans and of the machinery in the bakery. The two premises were entered as one hereditament in Part II of the valuation list. It was essential that facilities for the repair of the bakery plant should be available either in the bakery or close thereto in order that the supply of bread to customers should not be interrupted by a breakdown.

The Lands Tribunal, on appeal, rejected proposals by the valuation officer that the premises ought to be entered in the valuation list as two separate hereditaments, the bakery in Part II and the repair depot in Part I. The tribunal held that the use of the repair depot was so essential to the proper working of the bakery that the two premises should be treated as one hereditament. On appeal:—

Held, (1) that, although, prima facie, premises geographically separate were to be treated as separate hereditaments, the "functional" test applied by the tribunal was one open to it in law, and (2) that as the question whether the premises formed one or two hereditaments for rating purposes was one of degree and of fact, and as the tribunal had not misdirected itself in law, the court would not reverse its decision.

Observations as to the nature of the considerations to be taken into account in deciding such a question, and as to the weight to be attached to such considerations.

APPEAL by case stated from the Lands Tribunal (Mr. Erskine Simes Q.C.).

The respondent ratepayers were the owners and occupiers of a building on the south side of Albert Street, Wednesbury, Staffordshire, which was used as a bakery, and of a smaller building opposite on the north side of the street, which was used as a garage and repair shop. The two premises were covered by one entry in Part II of the valuation list as "Bakery, offices and "premises," with net annual value £620, industrial net annual value £561, rateable value £140, non-industrial net annual value £59, rateable value £59, total rateable value £199.

In July, 1953, the appellant valuation officer made three proposals: (1) to delete the existing entry from the valuation list; (2) to include the premises on the south side in Part II of the list as a separate hereditament, described as "Bakery and "premises" (hereinafter referred to as "the bakery," with a net annual value of £470 and a rateable value of £117); (3) to include the premises on the north side in Part I of the list as a separate hereditament described as "Repair depot" (and so hereinafter referred to) with a gross value of £184 and a rateable value of £150.

The ratepayers objected to these proposals, and an appeal by the valuation officer to the local valuation court was dismissed. The valuation officer appealed to the Lands Tribunal on the grounds: (a) that the premises were two separately rateable hereditaments; (b) and (c) that the repair depot and bakery ought to be entered in the valuation list in accordance with the proposals set out above.

At the hearing before the Lands Tribunal the following facts were proved or admitted: (a) to (e) the ratepayers, who carried

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on the business of retail bakers, owned and occupied the premises described above; (f) they also owned and occupied as offices another building on the north side of Albert Street which was separately assessed and formed no part of the appeal; (g) Albert Street was a highway repairable by the inhabitants at large, approximately 36 feet wide, and the ratepayers' two premises were immediately opposite to each other. No part of the highway had been purchased by the local authority; (h) to (l) the bakery was fully equipped with machinery for making bread on the "continuous belt" system and ran for 16 hours out of the 24, with an output of 12 million loaves per annum. It was essential that any breakdown should be dealt with immediately in order to prevent a shortage of bread for the ratepayers' customers; (m) and (n) it was essential that facilities should be available either at the bakery or very near to enable repairs to be carried out without delay, and for this purpose the ratepayers employed two bakery engineers and one bakery electrician, one of whom was on duty during every part of the 24 hours; (o) to (s) the repair depot was primarily occupied, equipped and staffed for the "repair and maintenance" of the ratepayers' 72 commercial vehicles and four private cars; it contained the necessary facilities for carrying out repairs to the plant and machinery of the bakery, which were used by the technical staff noted above; some members of the repair depot staff were used in connexion with their own class of work in the bakery; also sign and notice painting and the fabrication of ironwork, woodwork and machinery parts was carried out there.

The parties had agreed to the following values: (1) if the appeal was dismissed, a single entry of the premises in the valuation list with net annual value £620 and rateable value £199; (2) if the premises should be treated as two hereditaments, the bakery should be assessed at £470 net and £117 rateable; (3) if the repair depot, separately assessed, ought not to be derated, it should be assessed at £184 gross and net annual and rateable value £150. There was no agreement or sufficient evidence as to the value to be attributed to the repair depot if it should be separately assessed and entitled to derating, except that it was agreed that the net annual value should be £150.

It was contended for the valuation officer: (1) that the bakery and repair depot were two separate hereditaments and should be entered separately on the valuation list; (2) that the bakery was an industrial hereditament and should be entered in Part II

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of the list; (3) that the repair depot was not an industrial hereditament as being a place used by the occupier for the housing or maintenance of his road vehicles within the meaning of section 3 (2) (*b*) of the Rating and Valuation (Apportionment) Act, 1928,[1] and ought to be entered in Part I of the list; (4) that the bakery and repair depot were not within the same curtilage, nor contiguous to one another within the meaning of section 3 (3) of that Act; and further, that as the repair depot fell within section 3 (2) (*b*), it could not in any event be treated as part of a single factory or workshop together with the bakery under section 3 (3).

It was contended for the ratepayers that the premises in question were in the same occupation and formed one single hereditament; in the alternative, they denied contentions (3) and (4) above, and contended that the premises were either one single or two separate industrial hereditaments.

The decision of Mr. Erskine Simes Q.C. was in the following terms: " The first question which I had to determine was whether " the bakery and repair depot are properly treated in the valua- " tion list as one hereditament, or whether they are two separate " hereditaments and ought to be so entered on the said list. It " appeared to me that this was a question of fact: *North Eastern* " *Railway Co.* v. *York Union.*[2] Had the repair depot been used " for no other purpose than the repair and maintenance of the " vehicles owned by the [ratepayers] in their business I should " have had no difficulty in arriving at the view that they should " be treated as two separate hereditaments, as was done in the " case of *Bellamy (Valuation Officer)* v. *Hinckley U. D. C.*[3] " Offices such as formed the subject of the decision in *Spencer* " *and Thurrock U. D. C.* v. *Thames Board Mills Ltd.*[4] fell, in

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[1] Rating and Valuation (Apportionment) Act, 1928 (as amended by Local Government Act, 1929), s. 3: " (2) For the purposes of this Act— " . . . (*b*) any place used by the occupier for the housing or maintenance " of his road vehicles or as stables " shall, notwithstanding that it is " situate within the close, curtilage " or precincts forming a factory or " workshop and used in connexion " therewith, be deemed not to form " part of the factory or workshop . . . " (3) Where two or more properties " within the same curtilage, or con- " tiguous to one another, are in the " same occupation and, though treated " as two or more hereditaments for " purposes of rating and valuation by " reason of being situate in different " parishes or of having been valued " at different times or for any other " reason, are used as parts of a " single . . . factory, or workshop, " then, for the purposes of determin- " ing whether the several heredita- " ments are industrial hereditaments " they shall be treated as if they " formed part of a single heredita- " ment comprising all such heredita- " ments."

[2] [1900] 1 Q.B. 733.

[3] (1952) 23 D. & R.A. 192.

[4] (1954) 47 R. & I.T. 809.

"my view, into a different category, for while there may be some "convenience in having offices near to the factory, such proximity "is not essential. In the present case, however, I was satisfied "that the use of the repair depot in connexion with the repairs "of the bakery plant, although such use did not form the major "portion of the work done therein, was so essential to the "efficient work of the bakery itself that I arrived at the conclusion that, despite the separation of the two hereditaments "by a public highway, they should in the circumstances of this "case be treated as one hereditament. Having regard to this "conclusion, it became unnecessary for me to consider the other "contentions raised by either of the parties," and he accordingly dismissed the appeal.

The valuation officer appealed. At the hearing of the appeal it was stated that it had been admitted below that the ratepayers were the owners of the subsoil of the highway between the two premises.

Cyril Harvey Q.C. and *Patrick Browne* for the valuation officer. The tribunal was wrong in holding the question to be merely one of fact, and in applying the functional test to two buildings separated by a highway. In such a case the test is geographical; where premises are structurally and geographically separate and are capable of being separately let, they are separate hereditaments irrespective of their functional use. Unfortunately, the Act does not define the word "hereditament."

In the present case there is plainly a geographical and structural separation; if the functional test is to be applied in such a case it is difficult to know where it is to stop, to know whether it can still be applied if the premises are 50 or 100 or 500 yards apart. The balance of authority seems to show that one cannot discriminate according to the degrees of distance.

In *North Eastern Railway Co.* v. *York Union*[5] it was said that the question whether premises constituted one or two hereditaments was one of fact. That case dealt with a number of railway lines and structures all occupied for railway purposes, but all undivided and contiguous; it was held that they constituted one hereditament. It appears from the observations in that case that the functional test may be used for dividing one curtilage into two hereditaments, but not vice versa, as is sought in the present case.

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[5] [1900] 1 Q.B. 733.

The language of section 3 (3) of the Act of 1928 indicates an assumption by the legislature that ordinarily two or more properties which are contiguous and in one occupation will be treated as one hereditament; that leads to the supposition that two or more properties which are not contiguous or within the same curtilage will normally be treated as two or more hereditaments.

Mersey Docks and Harbour Board v. *Birkenhead Overseers* [6] supports the proposition that where there is one undivided area there may be circumstances in which the functional test may justify separate assessments, a view also supported by the observations of Lord Sands in *St. Cuthbert's Co-operative Association* v. *Assessor for Edinburgh.*[7] In *Mersey Docks and Harbour Board* v. *Liverpool Overseers* [8] it was held that the Liverpool docks must be rated separately from those at Birkenhead, though both were in the same ownership.

The application of the geographical test, that premises separated from one another must be separately rateable, is best illustrated by *Glasgow University* v. *Assessor for Glasgow*,[9] where a number of separated university buildings were held to be separately assessable; that case indicates that the functional test should not be used to qualify the geographical test in such circumstances.

Spillers Ltd. v. *Cardiff Assessment Committee* [10] and the cases heard together with it were principally concerned with the interpretation of the words "properties within the same curtilage, or "contiguous to one another" in section 3 (3). If it had been permissible to do what the tribunal has done here, almost all that litigation would have been pointless; the point in the present case was never taken. In the last case, which concerned two properties on opposite sides of the road, Mr. Wilfred Lewis, for the assessment committee, admitted that they were contiguous, as the ratepayer owned the subsoil of the road, as in the present case; but the court clearly disapproved of that admission.

It is often the case that in the country a farm, though divided by a public highway, is treated as a single hereditament, but that fact does not support the present ratepayers' contention; the court is not concerned with open land but with buildings. Section 22 and Schedule II of the Rating and Valuation Act, 1925, indicate that in rating law there is a contrast between land and buildings. Where the land is unbuilt, the presence of a public road dividing

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[6] (1873) L.R. 8 Q.B. 445.

[7] 1932 S.C. 340.

[8] (1872) L.R. 7 Q.B. 643.

[9] 1952 S.C. 504.

[10] [1931] 2 K.B. 21; 47 T.L.R. 231.

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it is accidental and immaterial; but if development takes place, and buildings are erected, then a number of separate hereditaments are created.

If the court should come to the conclusion that these are separate hereditaments, the repair depot on the north side should not be classed as an industrial hereditament. First, the buildings are not "contiguous"; see the disapproval by the court of Mr. Wilfred Lewis' admission in *Spillers'* case[11]; secondly, whatever claim the repair depot might have to be treated as an industrial hereditament is avoided by section 3 (2) (*b*).

Browne following. It appeared that the tribunal had established a fair working rule in *Bellamy (Valuation Officer)* v. *Hinckley U. D. C.*[12] and *Spencer and Thurrock U. D. C.* v. *Thames Board Mills Ltd.*,[13] but has resiled from those decisions in the present case, a result which leads to confusion. [Reference was also made to *Simmonds Aerocessories (Western) Ltd.* v. *Pontypridd Area Assessment Committee*[14] and *James A. Jobling & Co. Ltd.* v. *Sunderland County Borough Assessment Committee.*[15]]

Harold Williams Q.C. and *J. F. Bourke* for the ratepayers. It has never been thought before that this was a question of law. It is remarkable that the question as to what is a hereditament has so seldom been litigated. The way in which the courts have dealt with the matter is illustrated by *Rawlence* v. *Guardians of Hursley Union*,[16] where it was held that where a ratepayer owned a number of small parcels the individual value of each parcel need not be entered in the list. The *North Eastern Railway* case[17] establishes that the question is one of fact.

In considering a Scottish case it is difficult for an English lawyer to be sure that he can properly interpret its language and terms, and the subject-matter may not be quite understood; it is difficult to appreciate how far Lord Keith in *Glasgow University* v. *Assessor for Glasgow*[18] was stating a proposition of law.

In deciding the present question geography, structure and use are all relevant factors. The tribunal found that there was a substantial degree of integration between the two buildings, as the men in the repair depot had constantly to go over to the bakery and vice versa. If that is a question of fact, the decision is final unless there was a misdirection or no evidence to support it. The onus is on the appellant to establish that the law is such that the tribunal could not so decide.

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[11] [1931] 2 K.B. 21.
[12] 23 D. & R.A. 192.
[13] 47 R. & I.T. 809.
[14] [1944] K.B. 231; 60 T.L.R. 192; [1944] 1 All E.R. 264.
[15] (1944) 60 T.L.R. 330; [1944] 1 All E.R. 500.
[16] (1877) 3 Ex.D. 44.
[17] [1900] 1 Q.B. 733.
[18] 1952 S.C. 504.

[DENNING L.J. Can it not be said that common opinion makes the law? In all the *Spillers'* cases [19] no one ever thought of raising the present point which, if good, would have rendered the points raised unnecessary.]

Those cases were dealing with section 3 (3), which assumes that ordinarily contiguous properties occupied by one owner are rated as one. In *Jobling's* case [20] one of the premises was 150 yards away from the other and round the corner, and no argument based on contiguity could be sustained. In the absence of statutory directions to the tribunal as to what can be taken into account, it cannot be said to be wrong to take the function of the building into account.

The admission of Mr. Wilfred Lewis in the *Spillers'* cases [21] was based on the presumption of the ownership of the highway ad medium filum by these frontagers, and that principle is not attacked here. The admission was based on the decision in *Haynes* v. *King*,[22] where it was held that the ad medium filum principle made two buildings in the same ownership on opposite sides of the road " adjoining and contiguous " for the purposes of a lease there in question. Section 3 (3) seems to contemplate that two buildings which are contiguous or within one curtilage are to be treated as one in normal practice as a matter of fact. The question is whether it is possible as a matter of law for the tribunal to treat two buildings on different sides of the road as one hereditament; the appellant must establish that it is not possible: the right course is to follow common sense and convenience, as was apparently done in the *North Eastern* case.[23]

[DENNING L.J. What is the distinction between this case and the two cases previously decided by the same tribunal, *Bellamy* [24] and *Spencer* [25]?]

A difference of the degree in which one of the premises was essential to the other.

[DENNING L.J. I am concerned with what the proper direction in law should be. Lord Keith said that the functional test is of small weight; the tribunal in this case has attached the greatest weight to it.]

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[19] [1931] 2 K.B. 21.

[20] 60 T.L.R. 330.

[21] [1931] 2 K.B. 21.

[22] [1893] 3 Ch. 439.

[23] [1900] 1 Q.B. 733.

[24] 23 D. & R.A. 192.

[25] 47 R. & I.T. 809.

In a borderline case, such as this, the functional test, though not usually of primary importance, may be enough to decide the matter.

Harvey Q.C. replied.

Cur. adv. vult.

March 23. The following judgments were read.

DENNING L.J. Hickinbottom Ltd. are the owners and occupiers of two properties in Wednesbury. These properties are separated by a public road called Albert Street, which is 36 feet wide. On one side of the road the company run a large bakery which is fully equipped with machinery for making and packing bread. On the other side they have a repair depot which they use principally for the repair and maintenance of their 72 vehicles; but they also use it for repairing the plant and machinery in the bakery, and in this respect the repair depot is essential to the efficient working of the bakery itself.

The question for determination is whether the bakery and the repair depot are separate hereditaments for rating purposes or only one hereditament. The answer is very material, because if they are one, the whole will be entitled to the benefit of industrial derating; whereas if they are two, the bakery will be so entitled but the repair depot may not.

The case therefore raises the important question, what is a separate hereditament for rating purposes? The statutes contain no definition, but the practice which has prevailed for many years past warrants the following general rules:

First, take the case where two or more properties are within the same curtilage or contiguous to one another, and are in the same occupation. In that case they are, as a general rule, to be treated for rating purposes as if they formed parts of a single hereditament. There are, however, exceptional cases where for some special reason they may be treated as two or more hereditaments. That may happen, for instance, when they are situate in different rating areas, or because they were valued at different times (see section 3 (3) of the 1928 Act): or because they were at one time in different occupations (see *Spillers Ltd.* v. *Cardiff Assessment Committee*, *per* Avory J.[1]); or because one part is used for an entirely different purpose (see *North Eastern Railway Co.* v. *Guardians of York Union* [2]).

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[1] [1931] 2 K.B. 21, 47; 47 T.L.R. 231.

[2] [1900] 1 Q.B. 733.

Secondly, take the case where the two properties are in the same occupation but are not within the same curtilage nor contiguous to one another. In that case each of the properties must, as a general rule, be treated as a separate hereditament for rating purposes: and this is the case even though they are used by the occupier for the purposes of his one whole business. That was the position in the first four of the *Five Rating Cases* considered in 1931 [3] (*Spillers'* case, etc.). The two properties of the occupier were separated by the property of someone else, such as a dwelling-house, a canal or a railway. No one doubted that they should be treated as two separate hereditaments unless they could be said to be " contiguous " to one another, which the court held not to be the case.

Thirdly, take the case where two properties are separated by a public highway, the surface of which is vested in the highway authority and the soil is vested in the occupier of the two properties. In that case the position in general seems to me to be the same as if the two properties were separated by a canal, a railway or a dwelling-house occupied by somebody else. They are normally to be treated as two separate hereditaments for rating purposes. This was certainly assumed to be so in the fifth of the *Five Rating Cases* (*Blunt* v. *West Derby Assessment Committee* [4]). It was assumed that the properties on either side of the road should be separately rated unless they could be held to be " contiguous " within section 3 (3) of the 1928 Act; and, on this point of " contiguous or not," despite the admission made by Mr. Wilfrid Lewis, the court clearly indicated their view that in the ordinary way houses on opposite sides of the road were not contiguous. I must say that I agree with that view. The fact that the one occupier owns the subsoil of the road does not make them contiguous any more than if he owned the minerals underneath. It has nothing to do with the occupation.

Our present case comes within the third general rule. The two properties ought, therefore, prima facie, to be rated as two separate hereditaments. But this third rule is not inflexible. There are exceptional cases where two properties, separated by a road, may be treated as one single hereditament for rating purposes. That may happen when a nobleman's park, or a farm (when agricultural land was rated), or a golf course, is bisected by a public road. In such cases the two properties on either side of the road are so essentially one whole—by which I mean,

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[3] [1931] 2 K.B. 21.

[4] [1931] 2 K.B. 21, 44.

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so essential in use the one to another—that they should be regarded as one single hereditament.

Where does this case come? Within the third general rule or the exception to it? This is a question of degree and therefore of fact which is for the tribunal of fact, so long as it properly directs itself on the matter. Three cases were quoted to us where the tribunal of fact held that two properties on opposite sides of the road were two separate hereditaments although used as parts of one single undertaking. These cases are *Glasgow University* v. *Assessor for Glasgow*,[5] *Bellamy* v. *Hinckley U. D. C.*,[6] and *Spencer and Thurrock U. D. C.* v. *Thames Board Mills Ltd.*[7] Those cases commend themselves to my mind: and I confess that I find it very difficult to distinguish our present case from those on the facts; but there must be some distinction because the chairman of the Lands Tribunal had those cases well in mind; and he had the advantage of a view, which we have not. We can only reverse his decision if it was one to which he could not reasonably come. I am not prepared to go so far and I would therefore dismiss the appeal.

Morris L.J. The facts as proved or admitted are clearly recorded in the case stated and I need not recapitulate them. The bakery and repair depot were entered on the valuation list as being one hereditament. The local valuation court declined to delete the entry and declined to treat the bakery as one hereditament and the repair depot as a separate hereditament. On appeal to the Lands Tribunal the first question for determination was whether the bakery and repair depot could properly be treated as one hereditament, or whether they ought to be entered as two. It was held that in the circumstances of the case they should be treated as one.

In the case of *North Eastern Railway Co.* v. *York Union*[8] the question for the court was whether the whole of the railway property in a parish other than a hotel and refreshment rooms should be rated in one gross sum. It had been agreed that a separate value could and would be put on the hotel and refreshment rooms as a separate item.

In giving judgment Channell J. said[9]: "I agree that it is "almost entirely a question of fact. If the whole of these "different portions of property were one hereditament, they

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[5] 1952 S.C. 504.
[6] (1952) 23 D. & R.A. 192.
[7] (1954) 47 R. & I.T. 809.
[8] [1900] 1 Q.B. 733.
[9] Ibid. 739.

"ought to be rated in one lump sum, and whether they are one "hereditament or more seems to me to be a question of fact. "One thing I think is clear, that property must be rated according "to what it is, and not according to what it might be. You may "have a thing which, as it is, is one hereditament, but which is "quite capable of being made into two. The owner of a field "may sell half of it, and it may become two hereditaments in "different occupations; but while it is undivided it is one "hereditament. The fact that the different portions of the "property here are capable of being made separate heredita-"ments is immaterial. The facts stated by the arbitrator show "that at present they are one, though possibly with some slight "alteration they might be made into separate hereditaments."

The decision in the present case fell to be made as a question of fact, but a question of law may nevertheless arise as to whether there was some erroneous approach or whether weight was given to any considerations which ought to have been disregarded. It was submitted that there was an erroneous approach in that attention was paid to the use to which the repair depot was put in connexion with the repairs of the bakery plant. The tribunal held that the use of the repair depot in connexion with the repairs of the bakery plant (although such use did not form the major portion of the work done therein) was so essential to the efficient working of the bakery itself that, despite the separation of the two buildings by a public highway, they should in the circumstances of the case be treated as one hereditament. It was submitted, as set out in the notice of motion, "That the tribunal "misdirected itself in holding that the functional connexion for "the purposes of the respondents' business between the use of "the said 'repair depot' and the use of the said 'bakery' was "a relevant and decisive consideration in arriving at the con-"clusion that the said premises should be treated as one "hereditament." If, however, the consideration was a relevant and admissible one, then the weight to be attached to it was a question for the tribunal. The problem which is raised becomes, therefore, one as to whether on the facts of this case regard could be had to the use to which premises are put. It was submitted that if premises are in the same occupation and if they are contiguous, or if they are within the same curtilage, then prima facie they are to be regarded as one hereditament; but that in such circumstances a distinct and separate user of some part of such premises may justify regarding that part as a separate hereditament. The case of the hotel at York station in the case cited was given as an example. But it was submitted that if premises which are in the same occupation are structurally and geographically separate and if they are capable of being separately let, then the use to which the premises are put must be entirely excluded from consideration and the premises must be held to be separate hereditaments.

I do not feel able to accept this approach. I do not think that it is appropriate to lay down propositions of the above nature as being inevitably or invariably applicable. If, as I think, the decision as to whether premises form one hereditament is a question of fact, then I think that it is undesirable to prescribe some formula in words or to seek to define certain considerations as being relevant and to stipulate that others must be excluded. Parliament has not laid down a definition of a hereditament and difficulties might result if a rigid judicial definition were formulated. In the great majority of cases there will be no difficulty, after assessing all the considerations which apply according to the weight they command, in deciding whether premises comprise a hereditament. In the borderline cases where difficulty arises it is better to employ a common-sense assessment of the features of the case than to seek to have recourse to some standard formula. Thus, to illustrate, there may be several buildings or structures in the same occupation which can properly be regarded as being one hereditament. It may be that they are within one enclosure. That may be one circumstance which points to the conclusion that they comprise one unit: that circumstance may supply a useful basis or test. So also, buildings which, though not actually enclosed together or actually contiguous, are very near together and are not separated by the presence of other buildings and are being put to one common use may be regarded as comprising one hereditament. There can be no doubt that ordinarily very great weight will be placed upon what may be termed the geographical test. But the question is always one of fact and degree. On the other hand, where there are several buildings within one enclosure or curtilage, they may constitute separate hereditaments. This may be so because the buildings are separately let. It may also be so if the buildings, though not separately let, are capable of being separately let and are used for separate purposes. (See *North Eastern Railway Co.* v. *York Union*.[10]) To illustrate further, if there is a single building which is physically undivided and is in fact in the occupation of one occupier, it may be held to be one hereditament to be rated

[10] [1900] 1 Q.B. 733.

as a whole even though some parts are capable of separate letting. On the other hand, a single building may have several separate occupiers whose premises may be separately rateable as being separate hereditaments.

If in one occupation there are several buildings capable of being separately let, which are not within a common enclosure or curtilage but which are physically separated, and are interspersed among other buildings in other occupations, in such circumstances it would hardly be possible to regard them as comprising one hereditament, even though they were all used for a common purpose. The mere fact of a community of use or purpose would almost certainly in such case, in view of the other circumstances (such as the structural or geographical separation of the buildings, their dispersion among other buildings, and their capability of being separately let) be held not to be sufficient to warrant the buildings being considered as one hereditament. (See *Glasgow University* v. *Assessor for Glasgow.*[11])

I have merely cited a few examples and I have not attempted to refer to the varieties of situation which may arise or to refer exhaustively to the considerations which may have weight in deciding what a hereditament may comprise.

The present case was rather an exceptional one and depended upon its particular facts. But in my judgment there was no error of law in the approach of the tribunal. I would dismiss the appeal.

PARKER L.J. The question of law raised in this appeal by way of case stated is whether the Lands Tribunal misdirected itself in holding that the functional connexion for the purposes of the respondents' business between the use of the repair depot and the use of the bakery was a relevant and decisive consideration in arriving at the conclusion that the said premises should be treated as one hereditament. Unless it can be said that that functional connexion was in law irrelevant, or if relevant could not be decisive, the tribunal's decision must, I think, stand.

Whether or not premises in one occupation fall to be entered in the valuation list as one or more hereditaments depends upon a number of considerations. Without attempting an exhaustive list, the following considerations can be mentioned:—

(1) Whether the premises are in more than one rating area. If so, they must be divided into at least the same number of

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[11] 1952 S.C. 504.

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hereditaments as the rating areas in which the premises are situated.

(2) Whether two or more parts of the premises are capable of being separately let. If not, then the premises must be entered as a single hereditament.

(3) Whether the premises form a single geographical unit.

(4) Whether though forming a single geographical unit the premises by their structure and layout consist of two or more separate parts.

(5) Whether the occupier finds it necessary or convenient to use the premises as a whole for one purpose, or whether he uses different parts of the premises for different purposes.

Whereas a consideration of questions (1) and (2) will in certain events conclude the matter one way or the other, the same does not, I think, result from a consideration of any one of the other questions alone. The conclusion, where the considerations of (1) and (2) are not decisive, must depend on the weight to be attached on the facts of each case to the other considerations.

No doubt the most important of these other considerations is whether the premises form a geographical unit. Can they be ringed round on a map?

As Lord Keith said in *Glasgow University* v. *Assessor for Glasgow*[12]: "In the ordinary case where derating issues are not "involved the question whether separate buildings, or parts of "buildings, should be entered in the Roll as *unum quid* falls to "be decided primarily from the geographical standpoint."

This test is so often decisive that it is a convenient starting point to the inquiry, but it is not decisive in all cases. Thus, though the premises may form a geographical unit, the manner in which different parts are used may justify the premises being treated as several hereditaments; cf. *North Eastern Railway Co.* v. *York Union*, *per* Channell J.[13]

The appellant's contention, however, is that though the functional test may justify treating a geographical unit as two hereditaments, it is wholly inapplicable where the premises occupied are geographically and structurally separate. There is no doubt, I think, that in the latter case little weight will ordinarily be given to any functional connexion, but it is another thing to say that it is irrelevant. If, as is admitted, a functional connexion is a relevant consideration when considering a geographical and structural unit, I fail to see why as a matter of law it cannot be considered at all when there are separate geographical and

[12] 1952 S.C. 504, 509.

[13] [1900] 1 Q.B. 733, 739.

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structural units. Each case must be considered on its particular facts, due weight being given to the degree and nature of the separation on the one hand and the importance of the functional connexion on the other. Much reliance was placed by the appellant on the *Glasgow University* case,[14] in which the Lands Valuation Appeal Court held that the reading-room across the road from the main university buildings fell to be entered in the roll as a separate heritable subject, though the use of the reading-room formed an integral part of the students' university work. It is to be observed, however, that while saying that the functional test played little part in the question, Lord Keith did not suggest that it was not a relevant test. Further, it is to be observed that the court in that case were upholding a determination of the valuation committee, and accordingly were holding that the committee had not gone wrong in law in giving decisive weight in that case to the geographical test. It does not follow that the decision would have been the same if the valuation committee had held that the reading-room should be entered in the roll with the main university buildings as a single heritable subject.

In these circumstances I cannot hold that the Lands Tribunal erred in law. What weight was to be given to the different considerations was for the tribunal after hearing the evidence and viewing the premises.

Appeal dismissed.
Leave to appeal.

Solicitors: *Solicitor of Inland Revenue; Gregory, Rowcliffe & Co. for Shakespeare & Vernon, Birmingham.*

F. R. D.

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[14] 1952 S.C. 504.

LEE (VALUATION OFFICER) *v.* MID-NORTHAMPTONSHIRE WATER BOARD.

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Mar. 9, 12, 13, 14, 27.

Denning, Morris and Parker L.JJ.

Rates and Rating—Assessment—Rateable value—Profits basis—Statutory water undertaking—Whether sums raised by precepts to meet loan charges to be taken into account in assessing net annual value.

A statutory water board, operating in the areas of a number of local authorities, and assessed for rating purposes on the "profits" basis, derived their revenue partly from water charges on consumers and partly from precepts levied on the local authorities. Under the terms of their private Act, they had to make estimates of their revenue and expenditure for the forthcoming year, but could not allocate any particular part of revenue for any particular purpose, as all receipts had to be carried to a common fund out of which all expenses had to be defrayed.

In January, 1951, the board estimated that in the forthcoming financial year—April 1, 1951, to March 31, 1952—they would have to find some £9,615 loan charges on uncompleted works not yet in beneficial occupation, and they included that sum in the precepted total of £66,170 levied in respect of that year to meet anticipated deficiencies in revenue.

In proceedings before the Lands Tribunal to establish, inter alia, the cumulo net annual value of the undertaking for rating purposes, it was contended for the board that the sum of £9,615 should not be included in the gross receipts as it was not revenue potentially available to the hypothetical tenant, having been raised to meet the landlord's charges on works not yet occupied beneficially. The tribunal accepted that contention, and excluded that sum from their calculation of the cumulo. On appeal:—

Held, allowing the appeal, (1) that in reckoning the cumulo on the profits basis, estimates prepared for the purpose of future precepts should not be taken into account, as such estimates were not binding on the board and the money when received was not earmarked in any way; (2) that the total revenue from precepts must be taken into account, without any deduction for loan charges.

St. James' and Pall Mall Electric Light Co. Ltd. v. *Westminster Assessment Committee* [1934] A.C. 33; 50 T.L.R. 75 and *Aberdeen Magistrates* v. *Assessor for Aberdeen*, 1927 S.C. 458 applied.

Metropolitan Water Board v. *St. Marylebone Assessment Committee* [1923] 1 K.B. 86 and *Manchester Corporation* v. *Bolton Area Assessment Committee* (1930) 144 L.T. 570; 47 T.L.R. 210 overruled.

Per curiam. The hypothetical landlord who builds a waterworks would reasonably expect to receive enough rent to pay interest on the money borrowed and also to put something aside for a sinking fund. It is true that the question is what the hypothetical tenant can afford to pay, but in these cases the tenant has the power to raise the additional revenue to enable him to pay the rent which the landlord would reasonably expect to receive. The "interest "charges" and the "sinking fund charge" are, no doubt, landlord's charges; but that is irrelevant to the calculation of rent on the "profits basis." The hypothetical tenant would not take them into his calculations. The whole question is: what are his receipts? The particular application of the receipts once ascertained is immaterial: see *per* Lord Atkin in *St. James' and Pall Mall Electric Light Co.* v. *Westminster Assessment Committee* [1934] A.C. 33, 44.

Appeal by case stated from the Lands Tribunal.

The respondent board was a water undertaking constituted with financial effect as from July 1, 1949, by the Mid-Northamptonshire Water Board Order (Special Procedure) Act, 1949 (12 & 13 Geo. 6, c. ix). It was an amalgamation of a number of existing water undertakings, occupying hereditaments extending into 14 rating areas.

Subsequently the appellant valuation officer and the board made two sets of proposals for the alteration of the valuation list in respect of the board's hereditaments, with the result that there were at one time 28 appeals awaiting disposal by the local valuation court. By agreement two proposals regarding hereditaments in the Wellingborough rating area were selected as test cases. After the decision of the local valuation court, the valuation officer appealed, but only one appeal was argued in the Court of Appeal. This proposal was made by the valuation officer on September 29, 1952, for the rate period ending September 30, 1952. The proposal and the directions given by the local valuation court were as follows:—

Description of property.	Proposed value.	Value directed by local valuation court.
Pumping station	£2,117 net annual value and rateable value.	£1,386 net annual value and rateable value.
Booster station		
Water tower		
Offices (44 High Street)		
Water mains and appurtenances		

Before the Lands Tribunal it was agreed that the two appeals should be treated as test cases governing all the assessments in dispute, and that the method of valuation to be applied was that approved in *Kingston Union Assessment Committee* v. *Metropolitan Water Board.*[1] In the first instance, the tribunal was asked to decide the cumulo valuation for the whole of the hereditaments, the necessary apportionment being made later.

At the hearing before the tribunal the following facts (in addition to those set out above) were proved or admitted:—

3. (c) The Act contained a number of provisions relating to the way in which the board's revenue was to be derived and spent, which could be summarized by saying that the board was entitled to make certain charges for the supply of water, and if these were insufficient to meet their expenses the board could

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[1] [1926] A.C. 331; 42 T.L.R. 275.

issue precepts on the local authorities. After May 31, 1954, the power to charge for domestic water supplies would cease, with the result that the bulk of the revenue would be derived from the precepts.

(d) The board's financial year ended on March 31. By section 29 of the Schedule to the Act, the board were to make before the beginning of each financial year estimates of their probable revenue and expenditure (other than capital expenditure) during the year including any debit or credit balance carried forward from any previous year. If these estimates showed that the expenditure would exceed the revenue, the board were to apportion the sum required to meet the deficiency among the local authorities and to issue to each before the beginning of the financial year an apportioned precept. The practice of the board was to make such estimates each January in respect of the financial year beginning on the following April 1.

(e) Such an estimate for the year ending March 31, 1952, was made in January, 1951, and showed that expenditure was expected to exceed revenue (including balance brought forward) by £66,170, including an amount of £9,615 which it was anticipated would be required to finance capital expenditure on works not yet in beneficial occupation.

(f) The board issued precepts accordingly for £66,170. There was brought into account a surplus of £30,193 from the preceding year as " surplus of precept income "; but as the result of the deficiency of £82,712 on the year's working, the excess to be carried forward was only £13,651.

(g) The sum of £9,615 was for the express purpose of payment of loan charges for works not yet in beneficial occupation; but in fact only £3,365 was so spent. The difference arose from the fact that the board had over-estimated the amount which would be spent on works of construction in the year ending March 31, 1952.

(h), (i) The Act contained no provisions for the separation of any part of revenue for any specific purpose, and provided by section 27 of the Schedule that all receipts should be carried to a common fund and all expenses should be defrayed out of that fund. The accounts of the board showed no earmarking of the sum of £9,615, and the accounts did not indicate where the £3,365 came from.

(j) During the year ending March 31, 1952, the board were in occupation of works in respect of which loan charges, to the extent of £35,000 annually, had been paid off.

4 (a) Valuations in connexion with the first proposal (that argued before the Court of Appeal) were submitted by two chartered surveyors, Mr. Eve for the valuation officer, and Mr. Gray for the board, in the following terms:—

Gross Receipts	Valuation Officer (Mr. Eve). £	Board (Mr. Gray). £
1. Revenue from water charges, etc.	195,148	195,148
2. Revenue from precepts	66,170	56,555
3.	261,318	251,703
4. Working expenses, including repairs and renewals	187,521	187,521
5. Net receipts	73,797	64,182
6. Tenant's share	18,292	25,170
7. Net annual value plus rates	55,505	39,012
8. Deduct rates at average poundage of 20s. 5d.	28,039	19,707
9. Cumulo net annual value	£27,466	£19,305

[Note: Mr. Eve's computation of the tenant's share was based on 7 per cent. of the gross receipts, and Mr. Gray's computation on 10 per cent. of same.]

(b) The material difference between the two valuations (apart from details with which the appeal was not concerned) was the £9,615, referred to above, part of the revenue from precepts.

5. It was contended for the valuation officer that Mr. Eve's figures should be accepted; that the whole of the precept income constituted receipts of the hypothetical tenant; that it was not established that any sum in respect of the financing of loans was to be or was paid out of the precept income of £66,170; that, in the alternative, as only £3,365 was in fact spent in financing loans in respect of works not in beneficial occupation, the figure of gross receipts should be £257,953.

6. It was contended for the board that no part of the sum of £9,615 should be included in the gross receipts as such sum was not revenue potentially available to the hypothetical tenant by reason of its having been raised for the purpose of meeting landlord's loan charges in respect of expenditure on works not yet occupied.

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7, 8, 9. The tribunal set out the cases cited, and stated that counsel for the valuation officer had contended that the decision in *St. James' and Pall Mall Electric Light Co. Ltd.* v. *Westminster Assessment Committee* [2] had impliedly overruled *Metropolitan Water Board* v. *St. Marylebone Assessment Committee* [3] and *Manchester Corporation* v. *Bolton Area Assessment Committee*.[4] Counsel for the board relied on and supported the *Manchester* case.

10, 11, 12. The tribunal were of opinion that the *Manchester* [4] case had not been overruled, found in favour of the valuation officer on an immaterial detail not now under appeal, and held that the cumulo valuation should be as follows:—

Gross receipts:	£
Revenue from water charges, etc.	195,148
Revenue from precepts	56,555
	251,703
Working expenses, including repairs and renewals ...	187,521
	64,182
Tenant's share	18,292
Net annual value plus rates	45,890
Deduct rates at 20s. 5d. in the £	23,182
Cumulo net annual value	£22,708

Having so decided, the tribunal with the consent of the parties held that the net annual and rateable value of the premises in issue before the Court of Appeal was £1,443.

The valuation officer appealed.

Cyril Harvey Q.C. and *Patrick Browne* for the valuation officer. The water board are assessed on the "profits basis," the nature of which was explained in *Kingston Union Assessment Committee* v. *Metropolitan Water Board*,[5] and the question is how to assess the cumulo, or total net annual value of the board's hereditaments, the point being whether or not money raised by precepts for the purpose of paying interest on money intended to be borrowed is or is not to be taken into account.

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[2] [1933] 1 K.B. 605; 49 T.L.R. 159; [1934] A.C. 33; 50 T.L.R. 75.

[3] [1923] 1 K.B. 86.

[4] (1930) 144 L.T. 570; 47 T.L.R. 210.

[5] [1926] A.C. 331, 338.

The tribunal followed and applied *Manchester Corporation* v. *Bolton Area Assessment Committee.*[6] In that case it was decided that money raised by public water rate to meet interest on money borrowed in respect of works not yet completed was not to be included as part of the income of the hypothetical tenant; that case followed *Metropolitan Water Board* v. *St. Marylebone Assessment Committee,*[7] where the Divisional Court held that sums raised by precepts to meet loan charges were not to be included because such charges would fall on a landlord and not on a tenant. It is submitted that both these cases were wrongly decided and should now be overruled. In the *Kingston* case[8] Lord Blanesburgh intimated that the *St. Marylebone* case[7] was not correct.

In *St. James' and Pall Mall Electric Light Co. Ltd.* v. *Westminster Assessment Committee*[9] the ratio decidendi of the Divisional Court was the same as in the *St. Marylebone* case, and was disapproved in the Court of Appeal. The underlying idea of the Divisional Court was that if the revenue concerned does not benefit the tenant it is to be left out of account, and that money received is not revenue if it is collected on the basis of paying it over to the landlord. When the *St. James'* case came before the House of Lords[10] the Court of Appeal were upheld; it was said that the application of the revenue was of no concern, the point being how it was received. The *St. Marylebone* case[11] cannot stand, having regard to the decisions of the Court of Appeal and the House of Lords, and the *Manchester* case[12] must fall with it.

In *Mersey Docks and Harbour Board Trustees* v. *Cameron*[13] Blackburn J., delivering the opinion of the judges, stated that the object to which the notional rent is to be devoted is immaterial.

[MORRIS L.J. It seems to be very artificial to charge a hypothetical tenant with rent in respect of assets not yet in existence.]

The fact is that the whole law and practice of profits basis assessments are artificial throughout. If one keeps up the pretence that there is a landlord and tenant, one must keep up the pretence that it is what the tenant pays that matters and not what the landlord does with it. A landlord might covenant to extend the demised premises and the tenant might covenant to pay interest on the cost of the extensions.

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[6] 144 L.T. 570; 47 T.L.R. 210.

[7] [1923] 1 K.B. 86.

[8] [1926] A.C. 331, 353, 354.

[9] [1933] 1 K.B. 605; 49 T.L.R. 159.

[10] [1934] A.C. 33; 50 T.L.R. 75.

[11] [1923] 1 K.B. 86.

[12] 144 L.T. 570; 47 T.L.R. 210.

[13] (1864) 11 H.L.C. 443, 460, 463.

In *Dewsbury and Heckmondwike Waterworks Board* v. *Penistone Union Assessment Committee* [14] it was held that water rates levied to make up the difference between water rents and expenses must be taken into account; it was immaterial from what source the income was derived so long as it was incidental to the ownership of the property. In *Merthyr Tydfil Local Board of Health* v. *Merthyr Tydfil Assessment Committee* [15] it was held that a sum received by a water undertaking from the general rate in order to make up a deficiency of revenue was not assessable, but the reason was that the undertaking was under a statutory obligation to reimburse the general rate fund, so that the sum received was to be regarded as a loan and not an item of gross profit. The views expressed on these two cases in the *St. Marylebone* case [16] put a gloss on what was laid down in them.

These submissions are supported by the authority of *Port of London Authority* v. *Orsett Union Assessment Committee*,[17] *Magistrates of Glasgow* v. *Dempster* [18] and *Aberdeen Magistrates* v. *Assessor for Aberdeen* [19] (which completely covers the present case). In two exceptional Scottish cases it was held that certain receipts should not be taken into account. In *Assessor for Stirlingshire* v. *Stirlingshire and Falkirk Water Board* [20] there was excluded from assessment an unemployment grant made to the board to meet loan charges incurred in executing extensions not yet required; and in *Assessor for Fife* v. *Dunfermline District Committee*,[21] where a reservoir had been constructed in wartime under Government pressure so that the cost was highly excessive, an allowance of 20 per cent. was made. In those two cases the court departed slightly from the strict application of the profits basis, but there does not seem to have been any comparable decision in England. They also illustrate the curious fact that the more a water undertaking is in debt the higher is its rateable value; the reason is because in order to pay off the debt the undertaking has to raise its charges, and the receipts therefrom are strictly receipts from the supply of water.

Browne following. The starting figure for assessment is the actual receipts of the undertaking acting under its statutory powers; see observations of Lord Cave in the *Kingston* case[22] and of Greer L.J. in the *St. James'* case.[23] As the disposal of the revenue is quite irrelevant (*per* Lord Atkin in the *St. James'* case[24]), landlord's loan charges in respect of works in occupation are not a permissible deduction, and for the same reason the same applies to landlord's loan charges in respect of works not in occupation.

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[14] (1886) 17 Q.B.D. 384; 2 T.L.R. 417.

[15] [1891] 1 Q.B. 186.

[16] [1923] 1 K.B. 86.

[17] [1920] A.C. 273; 36 T.L.R. 233.

[18] (1884) 12 Rettie 3.

[19] 1927 S.C. 458.

[20] 1931 S.C. 369.

[21] 1929 S.C. 304.

Harold Williams Q.C. and *W. L. Roots* for the board. If there is a tenant in the house, and the landlord is building an extension, it is difficult to see how the tenant can be rateable in respect of the extension while the landlord is in occupation of it. The whole notion of the profits basis is quite artificial, and the duty of the tribunal of fact is to determine the rent at which the hereditament might reasonably be let from year to year.

In England no one in the 30 years since the *Kingston* case[25] has discovered any "special circumstances" to vary that basis. It is plain that what is to be considered is an actual hereditament in its condition on the date of the proposal: *Robinson Bros. (Brewers) Ltd.* v. *Houghton and Chester-le-Street Assessment Committee.*[26] The profits basis does not require a fair division between landlord and tenant either in England or Scotland. [*Railway Assessment Authority* v. *Southern Railway Co.*[27] was referred to.]

The hypothetical landlord is the owner and lessor of an actual hereditament; it is clear that whatever he actually spends in improving or altering the premises must be quite irrelevant to any question of valuation; expenditure so incurred cannot be a charge in the nature of a working expense, because it is spent out of his hypothetical rent. In the present case there are landlord's receipts and expenses which are excluded because they have nothing to do with the tenant.

The *Manchester* case[28] has not been overruled. It was decided on the principle that the only income with which the assessing authority was concerned was that of the tenant, and the only income to be taken into account is that of the actual rated hereditament; the assessment cannot be concerned with something which is not yet comprised in the tenancy. If a landlord raises the rent to meet the expenses of an extension under construction, the increase is not assessable until the extension has been completed and occupied; what comes into the hands of a landlord or tenant otherwise than from the occupation of the hereditament cannot be taken into account.

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[22] [1926] A.C. 331, 339.

[23] [1933] 1 K.B. 605, 651.

[24] [1934] A.C. 33, 44.

[25] [1926] A.C. 331.

[26] [1937] 2 K.B. 445; [1937] 2 All E.R. 337.

[27] [1936] A.C. 266; 52 T.L.R. 237; 34 L.G.R. 103.

[28] 144 L.T. 570; 47 T.L.R. 210.

The distinction between rates levied to meet precepts and water rates is that the former are paid by all ratepayers, while the latter fall on water consumers alone. The question for what the money is precepted is one for the tribunal of fact, and the fact that it is not earmarked merely adds to the difficulties of that tribunal.

The distinction between the present case and the *St. James'* case [29] is that there the hypothetical tenant was in actual occupation of the rated hereditaments, whereas here he could not be in possession of something which did not exist, but for which the money was raised. Both the *St. Marylebone* [30] and *Manchester* [31] cases were referred to with express approval by Slesser L.J.,[32] and were not referred to or in any way implicitly overruled in the House of Lords.[33]

The Scottish cases are governed by a different Act and fall under different procedure. It is difficult to reconcile the *Aberdeen* [34] and *Stirling* [35] cases. Matters are sometimes taken into account which are not considered relevant in England, and the general object seems to be that one must arrive at a rent which a tenant could pay.

Roots following. There is a distinction between revenue obtained by water charges and that obtained by precepts; in the *Manchester* case [36] it was sought to obtain relief only on the sum raised by the general rate, though, to be consistent with principle, even in the case of a water rate there should be a deduction where charges affecting a non-existent hereditament are concerned.

Harvey Q.C. in reply. It is wrong to say that the only revenue to be taken into account is that received in respect of an actual or working hereditament. Once the profits basis is applied the ordinary working principle of looking at the hereditament itself must be given up as unworkable. The accounts must be examined to ascertain what would be the gross receipts of the undertaking. It appears from *Clayton (Valuation Officer)* v. *British Transport Commission* [37] that where the profits basis is adopted it is not permissible to raise questions as to the value of individual hereditaments. That can only be done when the time comes to apportion the cumulo among the different hereditaments. There is no distinction between revenue raised by water charges or by precepts; none of the revenue is in any way earmarked to be spent in a particular way.

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[29] [1933] 1 K.B. 605; [1934] A.C. 33.

[30] [1923] 1 K.B. 86.

[31] 144 L.T. 570; 47 T.L.R. 210.

[32] [1933] 1 K.B. 605, 660.

[33] [1934] A.C. 33.

[34] 1927 S.C. 458.

[35] 1931 S.C. 369.

[36] 144 L.T. 570; 47 T.L.R. 210.

[37] [1955] 1 W.L.R. 504; [1955] 2 All E.R. 274.

Cur. adv. vult.

DENNING L.J. The judgment which I will read is the judgment of the court.

This case raises a question about the rating of the Mid-Northamptonshire Water Board. The board is constituted by the Mid-Northamptonshire Water Board Order Confirmation (Special Procedure) Act, 1949. In 1949 it took over the undertakings of several other previous water concerns. It serves the districts of 16 local authorities who nominate the members of the board. During the first five years of its existence, namely, from 1949 to 1954, the board obtained its revenue partly from rates levied on consumers and partly by issuing precepts to the local councils. After 1954 the board will obtain all its revenue, or nearly all of it, by means of precepts to local councils. Each council will add the amount of the precept to the general rate and collect it from the general ratepayers as part of the general rate. The consumers will, therefore, not pay their water rates separately from the general rate, but will pay the whole of their rates direct to the local council, who will then pay to the water board the amount of the precept.

This case arises out of a project for a new reservoir and other works. In the beginning of 1951 the board anticipated that they would spend £328,550 on new works in the year ending March 31, 1952, and would have to borrow capital money for the purpose. They estimated that they would have to pay £9,615 interest on this money and budgeted in their accounts accordingly. They prepared precepts so as to enable them to meet all their anticipated current expenditure, including this £9,615. It turns out that they did not spend £328,550 or anything like it on the new works, but only £112,167. The amount in fact required for loan charges was therefore not £9,615, but only £3,365. .

The question is how this £9,615 is to be treated in the accounts for rating purposes. The water board is rated on the "profits basis," which was explained by Lord Cave in *Kingston Union Assessment Committee* v. *Metropolitan Water Board*,[1] and I will read two sentences from his judgment: "In these

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[1] [1926] A.C. 331, 338–339.

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"circumstances it was desirable, in order that a fair assessment might be arrived at, to devise some formula which, while allowing a fair value to the hereditaments in each parish, would not compel the undertakers to pay rates on an aggregate sum exceeding the whole yearly value of their undertaking; and accordingly rating surveyors, soon after the passing of the Act of 1836, began to assess waterworks and other like concerns, such as railways, canals, gasworks, etc., upon the basis of the profits earned by the whole undertaking. From the gross receipts of the undertakers for the preceding year they deducted working expenses, an allowance for tenant's profit, and the cost of repairs and other statutable deductions, and treated the balance remaining (which would presumably represent the rent which a tenant would be willing to pay for the undertaking) as the rateable value of the entire concern."

Applying this basis, the figures found by the tribunal are as follows:

For the rate period ending September 30, 1952.

	£
Gross receipts:	
Revenue from water charges, etc.	195,148
Revenue from precepts	56,555
	251,703
Working expenses, including repairs and renewals ...	187,521
	64,182
Tenant's share	18,292
N.A.V. plus rates	45,890
Deduct rates at 20s. 5d. in the £	23,182
Cumulo net annual value	£22,708

The figure that is questioned is the "Revenue from precepts, £56,555." The true revenue from precepts as shown in the accounts was £66,170, but the tribunal thought that in arriving at the figure of revenue for the "profits basis" they ought to exclude the £9,615 (which was estimated for loan charges). They deducted it, therefore, from the £66,170 and arrived at the sum of £56,555. The tribunal came to that decision because they thought that they were bound so to do by reason of *Manchester Corporation* v. *Bolton Area Assessment Committee*.[2]

It was shown to us that the current revenue of the board in 1952 was not enough to meet the current expenditure. They started off on April 1, 1951, with a credit balance of £30,193 3s. 4d. brought forward from the previous year. They finished up on March 31, 1952, with a credit balance only of £13,650 16s. 5d. They described this as the "excess of precept "income": but they had had to draw on the last year's balance to get any excess.

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[2] (1930) 144 L.T. 570; 47 T.L.R. 210.

It seems to us to be quite wrong to bring into the "profits "basis" any of the estimates which are prepared for the purpose of calculating the amount of the precepts. The estimates are not binding on the board. Once they issue the precepts and get the money, they can use it as they like, provided, of course, that they use it for the board's purposes. No part of it is earmarked for any particular purpose. The £9,615 may not have gone to pay any interest charges at all. It may have been used up in paying salaries or wages: or it may not have been used at all. It may all have gone into the balance carried forward of £13,650 16s. 5d.

Even if the £9,615 could be earmarked for interest charges, we do not think it ought to be deducted. The revenue from precepts was £66,170. That was the revenue of the board of which they had the right to dispose as they wished. It ought to be taken without any deduction for interest charges. That is, we think, the result of the cases which we now proceed to consider.

In the past, the revenue of the water boards has often been derived in part from water rents levied on the consumers for water supplied; and in part from a "public water rate" levied on householders in order to aid the receipts of the board and ensure that it suffers no loss. In such cases it has been decided for over 70 years that, in applying the "profits basis," the revenue is to be taken as the total revenue from water rents and water rates without any deduction for interest charges on borrowed money: see *Dewsbury and Heckmondwike Waterworks Board* v. *Penistone Union Assessment Committee* [3] and *Merthyr Tydfil Local Board of Health* v. *Merthyr Tydfil Assessment Committee*.[4]

In *Metropolitan Water Board* v. *St. Marylebone Assessment Committee*,[5] where we will simplify the facts, the Metropolitan Water Board received in one year £3 million from the consumers of water. The board spent £2½ million on working expenses. They also had to pay £1½ million for interest charges on capital sums they had borrowed. They would therefore be £1 million down

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[3] (1885) 16 Q.B.D. 585; (1886) 17 Q.B.D. 384.

[4] [1891] 1 Q.B. 186.

[5] [1923] 1 K.B. 86.

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on the year. In order to meet the £1 million deficiency, they issued precepts on local authorities who added the amount on to the general rate, collected it from the general body of the ratepayers and handed it over to the water board. The question was whether the sum received by means of precepts was to be included as part of the revenue of the hypothetical tenant. The Divisional Court held the sums received from precepts were not to be included because the interest charges were payments of a kind which would fall upon a landlord and not on a tenant. The Divisional Court distinguished the *Dewsbury* case [6] on grounds that are not apparent to us. The only difference that we can see is that the revenue in the *St. Marylebone* case [7] was derived, not from water rents or from water rates levied on householders, but from precepts directed to the local authorities—which seems to us only a difference in the mode of collecting the revenue—not in the nature of it.

Three years later, Lord Blanesburgh pointed out the remarkable consequences of the *St. Marylebone* [7] decision and hinted that it was not correct: see *Kingston Union Assessment Committee* v. *Metropolitan Water Board*.[8] We think it plain that it cannot stand with the reasoning of the House of Lords in *St. James' and Pall Mall Electric Light Co. Ltd.* v. *Westminster Assessment Committee*.[9] The hypothetical landlord who builds a waterworks would reasonably expect to receive enough rent to enable him to pay interest on the money he has borrowed and also to put something aside for a sinking fund. It is true that the question is what the hypothetical tenant can afford to pay, but in these cases the tenant has the power to raise the additional revenue required to enable him to pay the rent which the landlord would reasonably expect to receive. The "interest "charge" and the "sinking fund charge" are, no doubt, landlord's charges: but that is irrelevant to the calculation of rent on the "profits basis." The hypothetical tenant would not take them into his calculations. The whole question is what are his receipts? The particular application of the receipts when once ascertained is immaterial: see per Lord Atkin.[10]

In the *St. Marylebone* case [11] the Divisional Court were impressed by the argument: If the board levies a rate to meet interest charges, surely both items must appear in the annual accounts. The rate must come on the revenue side and the interest charge on the expenditure side. You cannot take one without the other. That is a fallacy which has often been exposed. It fails to have regard to the hypothesis underlying the "profits "basis." Once you assume a hypothetical landlord and a hypothetical tenant, it is apparent that the tenant is not concerned with interest charges paid by his landlord. He is not concerned with whether his landlord is living on borrowed money or not.

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[6] 17 Q.B.D. 384.
[7] [1923] 1 K.B. 86.
[8] [1926] A.C. 331, 353, 354.
[9] [1934] A.C. 33; 50 T.L.R. 75.
[10] [1934] A.C. 33, 44.
[11] [1923] 1 K.B. 86.

The *Manchester* case [12] followed the *St. Marylebone* case, and we will simplify the facts there, too. It appeared that the Manchester Corporation had a revenue of £750,000 from the ratepayers, of which £670,000 was received from the "domestic "water rate" levied on consumers, and £80,000 from a "public water rate" levied on owners of property. The corporation spent £635,000 in paying working expenses and also paying interest on capital sums they had borrowed in the past for works that had long been completed and were in use. They had, however, recently borrowed further sums so as to make a new pipe-line and service reservoir. They had not completed these new works, but they had had to pay interest on the sums borrowed. This interest came to £115,000. In order to meet that interest charge, the corporation applied the whole of the £80,000 which they had received from the public water rate and also £35,000 out of the receipts from the domestic water rate. The question was whether the £80,000 received from the public water rate was to be included as part of the revenue of the hypothetical tenant. The Divisional Court held that it was not to be included. Avory J. held that the question was governed by the *St. Marylebone* case.[13] He held that the interest charges were landlord's charges: and that the £80,000, being raised to meet a landlord's charge, ought not to be brought into account. The decision was, we think, also wrong. Being based on the *St. Marylebone* case, it falls with it, unless a distinction can be drawn on the ground that in the *Manchester* case [14] the works were not completed. No such point was taken in the *Manchester* case, but it is the very point here and we must consider it.

It is said that a hypothetical tenant would not pay any rent for works which were not completed, so nothing should be included on that account. The answer is, however, that we are not inquiring what rent he would pay for the yet uncompleted works, but the rent for the already completed works. The hypothetical landlord of a growing undertaking would reasonably expect to receive enough rent from the existing works to enable him to keep pace with his growing expenditure. The hypothetical tenant is not concerned with what the hypothetical landlord does with his money once he gets it. The hypothetical landlord can lay it out on maintaining the old works or making new ones. The whole question is, what is the landlord's rent? What he does with it is his concern, not the tenant's.

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[12] 144 L.T. 570; 47 T.L.R. 210.
[13] [1923] 1 K.B. 86.
[14] 144 L.T. 570; 47 T.L.R. 210.

The point is also put in a slightly different way. It is said that what is being rated is the existing water system, not the uncompleted works which are incapable of beneficial occupation. This, however, carries the matter no further, since the question is always what revenue can be obtained by the hypothetical tenant from his occupation of the hereditaments to be rated, and all the receipts from the precepts form part of such revenue. The Court of Session had this very point before them in *Aberdeen Magistrates* v. *Assessor for Aberdeen.*[15] The Aberdeen Corporation had spent £7,390 on interest and sinking fund on incomplete and unproductive works. They argued that this should be deducted from their total revenue: but the court held that the deduction was inadmissible. We agree with that decision and think we should follow it.

In coming to our conclusion, we have not failed to observe that the House of Lords in the *St. James's* case[16] and, except for Lord Blanesburgh, in the *Kingston Union* case,[17] have not thrown any doubt on the *St. Marylebone* case,[18] and that Slesser L.J. in the *St. James's* case,[19] appears to refer to both the *St. Marylebone* and *Manchester*[20] cases with approval: but in those cases they did not come directly up for consideration, whereas they do here.

We think that the *St. Marylebone* case and the *Manchester* case were wrongly decided and should be overruled. The tribunal were wrong in deducting the £9,615 from the gross revenue of the board. The appeal should be allowed accordingly.

Appeal allowed.
Case remitted to the Lands Tribunal.
Leave to appeal.

Solicitors: *Solicitor of Inland Revenue*; *Sherwood & Co. for C. E. Vivian Rowe, Northampton.*

F. R. D.

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[15] 1927 S.C. 458.

[16] [1934] A.C. 33.

[17] [1926] A.C. 331.

[18] [1923] 1 K.B. 86.

[19] [1933] 1 K.B. 605.

[20] 144 L.T. 570; 47 T.L.R. 210.

CULLEY AND OTHERS *v.* HARRISON.

1956
April 25.

Lord Goddard C.J., Cassels and Donovan JJ.

Sunday—Observance—"Place"—Public park used for public entertainment on Sunday—Motor-cycle scramble held in roped off enclosure in extensive public park—Admission of public to enclosure on payment of money—"House, room, or other place"—Disorderly house—Disorderly place—Act aimed at public entertainment for money on Sunday—Public park a "place" within meaning of Act—Sunday Observance Act, 1780 (21 *Geo.* 3, *c.* 49), *s.* 1—*Common Informers Act,* 1951 (14 *&* 15 *Geo.* 6, *c.* 39), *s.* 1 (3).

Ejusdem Generis Rule—Statute—Place—"House, room or other place"—Sunday Observance Act, 1780, *s.* 1.

By the Sunday Observance Act, 1780, s. 1: " . . . any house, "room or other place, which shall be opened or used for public "entertainment or amusement . . . upon any part of the Lord's "day called Sunday, and to which persons shall be admitted by the "payment of money . . . shall be deemed a disorderly house or "place; and the keeper of such house, room, or place . . . and the "person managing or conducting such entertainment or amusement "on the Lord's day . . ." shall, by section 1 (3) of the Common Informers Act, 1951, be liable, upon summary conviction, to a fine.

The mischief aimed at by the Sunday Observance Act, 1780, is public entertainment for money on Sunday. The words "house, "room" in section 1 do not establish a genus and, therefore, the word "place" is not restricted in its meaning by reference to the preceding words, but, on the true construction of the section, means any place set aside for public entertainment or amusement to which the public is admitted on Sunday by the payment of money.

Where, therefore, certain officials, who took part in managing or conducting a motor-cycle scramble which took place on a Sunday in a roped off enclosure in an extensive public park, the public being admitted to the enclosure on payment of money or by tickets paid for in money, were charged with using a certain place, namely, the park, contrary to section 1 of the Sunday Observance Act, 1780:—

Held, that the park was a "place" within the meaning of the section and accordingly the officials were guilty of the offence charged.

CASE STATED by Lancashire justices sitting at Leyland.

Informations were preferred by a superintendent of police against the first four defendants, Norman Leslie Culley, Joseph Clunan, Clifford Clegg and John Ashworth, alleging that each of them on August 7, 1955, used a certain place, namely, Cuerden Park, for public entertainment, to wit, a motor-cycle scramble, to which persons were admitted by the payment of money, such day being the Lord's day, called Sunday, whereby the place was deemed to be a disorderly place, contrary to section 1 of the Sunday Observance Act, 1780,[1] and section 1 (3) of the Common Informers Act, 1951. Informations were similarly preferred against the fifth and sixth defendants, Reginald Haley William and Arthur Bentley Gaskell, alleging that each of them aided and abetted the first four defendants to commit the above-mentioned offences.

The following facts were found by the justices: August 7, 1955, was a Sunday, and on that day a type of competition or race known as a motor-cycle scramble was held at Cuerden Park in the County of Lancaster. The public were admitted as spectators to the motor-cycle scramble, which was a public entertainment, by the payment of money or by tickets sold for money. The defendants Culley and Clunan were respectively the secretary of the scramble and the clerk of the course, and the defendants Clegg and Ashworth were stewards thereat, and each of them in the course of his duties took part in managing or conducting the public entertainment. The defendants William and Gaskell were respectively chief marshal and official starter at the scramble, and in carrying out their duties as such aided and abetted each of the other defendants to manage or conduct the public entertainment. Cuerden Park, admittedly a defined and definite area, was a very extensive park consisting of many acres to which access was gained by the public on the occasion in question by an entrance known as Stag Lodge. On the occasion of the scramble, at intervals along the road leading from the entrance through the park, officials were stationed to stop vehicles and, after making the appropriate charge for parking, to direct the vehicles to the areas, consisting of many acres, used as parking places for vehicles. At a point approximately a quarter of a mile from the Stag Lodge entrance the course on which competitors rode was divided off by a wire and rope barrier, and admittance to the land adjoining the course was gained by the public by the purchase of tickets at seven spaces in the barrier, at each of which such tickets were sold, the charge being 1s. 6d. for each adult and 6d. for each child. Only a small portion of the course could be seen by persons at points between the Stag Lodge entrance and the barrier without passing the barrier or purchasing a ticket. There were no buildings or structures at any material part of the park save for a temporary structure erected for use as toilets and tents erected and used by a firm of caterers for providing refreshments. At two points in the course there were uncovered enclosures formed by rope or wire barriers for use by officials.

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[1] Sunday Observance Act, 1780, s. 1: ". . . any house, room, or "other place, which shall be opened "or used for public entertainment or "amusement, or for publicly debating "on any subject whatsoever, upon "any part of the Lord's day called "Sunday, and to which persons shall "be admitted by the payment of "money, or by tickets sold for money, "shall be deemed a disorderly house "or place; and the keeper of such "house, room, or place shall" by section 1 (3) of the Common Informers Act, 1951, be liable on summary conviction to a fine and "be otherwise "punishable as the law directs in cases "of disorderly houses: and the person "managing or conducting such entertainment or amusement on the "Lord's day, or acting as master of "the ceremonies there, or as moderator, president or chairman, . . . and "every doorkeeper, servant or other "person who shall collect or receive "money or tickets from persons "assembling at such house, room, "or place, on the Lord's day, or who "shall deliver out tickets for admitting persons to such house, room or "place, on the Lord's day," shall be similarly liable.

It was contended by the defendants that the words "other "place" in section 1 of the Sunday Observance Act, 1780, must be construed ejusdem generis with the preceding words "any "house, room" and accordingly that Cuerden Park was not a place within the meaning of the Sunday Observance Act, 1780.

It was contended by the prosecutor that Cuerden Park was a place within the meaning of the Sunday Observance Act, 1780, since (a) the ejusdem generis rule did not apply to the Sunday Observance Act, 1780, and that, accordingly, no limitation could be placed on the meaning of the word "place" provided that it was a defined area; and (b) even if the ejusdem generis rule applied to the Act, Cuerden Park was ejusdem generis with the preceding words "any house, room."

The justices were of opinion that Cuerden Park was a "place" within the meaning of the Sunday Observance Act, 1780, and that the first four defendants were either managing or conducting a public entertainment, namely, a motor-cycle scramble, and that the last two defendants aided and abetted them so to do, and, accordingly, they convicted each of the defendants and fined the first four £50 and the last two £10 on each of four summonses.

The defendants appealed.

B. H. Gerrard (*Norman Skelhorn Q.C.* with him) for the defendants. Cuerden Park is not a "place" within the meaning of section 1 of the Sunday Observance Act, 1780; the words "house, room, or other place" in the section connote some form of structure.

[LORD GODDARD C.J. "House" and "room" do not establish a genus. Some meaning must be given to the word "place."]

There is no authority where anything other than a structure has been held to be a " place " within the section. The sidenote shows that the section is concerned with a " disorderly house," and the word place must refer to a permanent structure, such as a cinema, dance hall or barn, not to an open space. Cuerden Park is not the less an open space because it is a defined and restricted area. The section categorizes the type of person whom it was intended to penalize, such as the keeper, the president or chairman and the moderator; all those persons are associated with a structure.

The Sunday Observance Act, 1780, is a penal statute and must be construed in a fashion to prevent the mischief at which it was aimed at the time when it was passed. [Reference was made to *Reid* v. *Wilson and Ward.*[2]] The earlier Acts dealing with the same subject show what was the mischief aimed at by this Act. The Sunday Observance Act, 1625, was concerned with " bull-baiting " and " bear-baiting " and " any sports and pastimes whatsoever," and the Sunday Observance Act, 1677, dealt with shopkeepers and tradesmen, " artificer, workman, labourer, or any other person whatsoever." The words " any sports and pastimes whatsoever " in the Act of 1625 should presumably be construed ejusdem generis with " bear-baiting " and " bull-baiting," and on this point the passage in Halsbury's Statutes of England, 2nd ed. (1948), vol. 5, p. 506, is adopted; while the words " or other person whatsoever " in section 1 of the Act of 1677 have been held not to include a stage coach driver, farmer, barber and possibly a solicitor, but to be confined to the followers of a calling like those specified in the preceding words. It is submitted, therefore, that the ejusdem generis rule of construction should similarly be applied to the words " house, room, or other place " in section 1 of the Act of 1780.

Richard Elwes Q.C. and *John Hobson* for the prosecutor. There is no indication in the Act of 1780 that it was intended to restrict the operation of the Act to what took place under a roof, and there are no grounds for applying the ejusdem generis principle of construction to the words " house, room, or other place " in section 1. The words used are similar to those used in section 2 of the Disorderly Houses Act, 1751, " An Act for the better preventing thefts and robberies, and for regulating places of public entertainment, and punishing persons keeping disorderly houses "; by section 2 of that Act " any house, room, garden, or other place kept for public dancing, music, or other

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[2] [1895] 1 Q.B. 315; 11 T.L.R. 88.

"public entertainment of the like kind, in the cities of London "and Westminster, or within 20 miles thereof . . . shall be deemed "a disorderly house or place." In contemporary enactments the expression "disorderly house or place" must have been well understood and susceptible of an interpretation which included out of doors; otherwise it would have been sufficient to say "shall "be deemed a disorderly house" without adding the words "or "place." [Reference was also made to *Powell* v. *Kempton Park Racecourse Co. Ltd.*[3]]

[They were stopped.]

Norman Skelhorn Q.C. in reply. Where a general word follows particular words it is, generally speaking, to be construed ejusdem generis with the preceding words, subject only to the qualification that, if the mischief of the Act requires the word to be given a wider meaning, the intention of the Act overrides the ejusdem generis principle of construction. That is the approach which the court should adopt in construing the words of this Act.

Mathew J., construing section 1 of the Act of 1780 in *Reid* v. *Wilson and Ward*,[4] said that some light was thrown upon the meaning of the Act by the prior Act, the Disorderly Houses Act, 1751. Section 2 of that Act used the words "house, room, "garden, or other place." The similarity between the two Acts suggests that the Act of 1780 was based on the earlier Acts, and it is of significance that the word "garden" was omitted from the later Act, and in that connexion the comment in relation to *Farndale* v. *Bainbridge*[5] in The Solicitors' Journal, (1898), vol. 42, p. 192, is adopted as part of the argument for the defendants.

[Lord Goddard C.J. Vauxhall Gardens and Ranelagh[6] might have been one of the reasons for the use of the word "garden."]

If the word "garden" was intended to refer to Vauxhall Gardens or Ranelagh that might indicate that Parliament appreciated that the words "other place" were insufficient to cover such places.

Lord Goddard C.J. This is a case stated by justices for the County of Lancaster, before whom the defendants were summoned as principals or aiders and abettors for breaches of the Sunday Observance Act, 1780, and the point raised is very short and very simple.

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[3] [1899] A.C. 143; 15 T.L.R. 266.

[4] [1895] 1 Q.B. 315, 317.

[5] (1898) 42 Sol.Jo. 192 (note).

[6] Vauxhall Gardens developed as a place of general entertainment from 1732 onwards, and was closed in 1859; Ranelagh opened as a place of entertainment in 1742 and was closed in 1803. (Encl. Brit.) J.F.L.

Near Preston there is a public park called Cuerden Park, and on the particular Sunday on which the offences are alleged to have been committed there was an enclosure of part of Cuerden Park for admission to which money was charged, and in that enclosure was held what is called a motor-cycle scramble. It is unnecessary to go into the nature of a motor-cycle scramble because obviously it is some form of entertainment to which the public are invited, just as a football match is an entertainment.

The only point in the case is whether or not a place such as this enclosed in a public park can be said to be a "place" within the meaning of section 1 of the Act. The words of the section are: "Be it enacted . . . that from and after the passing of " this present Act, any house, room, or other place, which shall " be opened or used for public entertainment or amusement, " or for publicly debating . . . upon any part of the Lord's day " called Sunday, and to which persons shall be admitted by the " payment of money, or by tickets sold for money, shall be " deemed a disorderly house or place." So there can be a disorderly place as well as a disorderly house.

The justices convicted the defendants, in my opinion rightly, and it is contended on appeal to us that the justices were wrong because it is said that "place" must be construed ejusdem generis with the words "house" or "room" which have gone before. The principles upon which the construction generally known as that of ejusdem generis are applied are well known; they are to be found in books such as Maxwell on the Interpretation of Statutes, and it is unnecessary in this case to go exhaustively into them. I do not think that "house, room" can really be said to establish a genus. I think that Parliament is really saying that such meetings must not be held in a building and must not be held in a place. The use of the words "house" or "place" shows that it will offend against "An Act for pre- " venting certain abuses and profanations on the Lord's Day, " called Sunday," if these meetings are held on Sunday in a house or room or place. It is significant that in Acts of Parliament which make illegal matters of this kind the expression "disorderly houses" is generally used, and I think that this Act and the earlier Act, the Disorderly Houses Act, 1751, show quite plainly that one can have not only disorderly houses but disorderly places. "Disorderly house" indicates something within four walls and a roof, and "disorderly place" would be a place set aside for public entertainment or music or dancing or whatever it may be that the particular Act prohibits. It seems to me that if we were to decide that what was done here was no breach of the Act, it would follow that every racecourse could be opened on Sunday and races could take place. It is well known that races do not take place on Sunday, and I think they do not take place because of these Acts. If we gave a decision the other way, it would be perfectly possible for racecourses to be opened and for dog racing and motor racing to take place, provided that the buildings, the grandstands and refreshment rooms, were closed on Sunday. I do not think that it was intended that that sort of recreation should take place on Sunday. To my mind it is perfectly clear that the word "place" is meant deliberately to be wider than the words "house" and "room." The justices, therefore, were justified in finding that this was a "place" within the meaning of the Act. I think that this appeal fails.

CASSELS J. I agree.

DONOVAN J. I agree. The question is one of the construction of section 1 of the Act of 1780, and the rule of ejusdem generis is merely an aid to that construction. If "house" and "room" comprise a genus, as suggested, it is difficult to think what species of that genus are connoted by the words "or other "place," which would not itself be a house or room. The words have to be construed bearing in mind the mischief at which this Act was aimed, and the mischief aimed at is clearly a public entertainment for money on Sunday. That does not itself require that the word "place" shall be restricted in its meaning by reference to its predecessors in the section. In fact, I think the reverse is the case. The Disorderly Houses Act, 1751, includes the expression "house, room, garden, or other place," and that has led to an argument based on the omission of the word "garden" in the present statute. It is always a little risky to construe one statute by reference to another, and particularly so in this case because there might have been special reasons for specifically mentioning "garden" in the Act of 1751. Be that as it may, I cannot treat the argument as overriding the indications that the word "place" in the Act of 1780 should receive its full meaning.

Appeal dismissed.

Solicitors: *A. J. A. Hanhart for A. S. Coupe, Lowe & Co., Rochdale; Vizard, Oldham & Co.*

J. F. L.

C. A.

1956
Mar. 19, 20.

Denning, Morris and Parker L.JJ.

FISHER *v.* TAYLORS FURNISHING STORES LTD.

[Plaint No. L. 295.]

Landlord and Tenant — Act of 1954 — *Business premises — Landlords' intention to reconstruct—Application for new tenancy—Landlords' intention to demolish premises and reconstruct for own occupation —Right of landlords to possession—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 30 (1) (*f*) (*g*), (2), 31 (1).

The landlords of a retail shop, who had purchased the premises within the preceding five years, gave notice to the tenant determining his tenancy on December 25, 1955. On the tenant applying to the county court under the Landlord and Tenant Act, 1954, for the grant of a new lease the landlords opposed on the ground that on the termination of the tenancy they intended to demolish and reconstruct the premises and could not reasonably do so without obtaining possession.[1] It was proved to the satisfaction of the judge that the landlords intended to demolish the whole of the premises; that they could not reasonably do so without obtaining possession, and that their object was not to occupy the old building but to rebuild on the site and to occupy the new building for the purposes of their business of furniture retailers. The judge, considering himself bound by *Atkinson* v. *Bettison* [1955] 1 W.L.R. 1127; [1955] 3 All E.R. 340, granted a new lease. On appeal:—

Held, allowing the appeal, that the grant of a new lease should be refused. As the landlords had established to the satisfaction of the court that they genuinely intended to demolish and rebuild the premises on the expiration of the tenancy, and reasonably required possession for that purpose, the fact that they intended to occupy the rebuilt premises themselves did not deprive them of their right to possession.

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[1] Landlord and Tenant Act, 1954, s. 30: "(1) The grounds on which a "landlord may oppose an application "[for a new tenancy under the Act] ". . . are such of the following "grounds as may be stated in the "landlord's notice . . . that is to "say:— . . . (*f*) that on the termina- "tion of the current tenancy the "landlord intends to demolish or "reconstruct the premises comprised "in the holding or a substantial part "of those premises or to carry out "substantial work of construction on "the holding or part thereof and that "he could not reasonably do so with- "out obtaining possession of the "holding; (*g*) subject as hereinafter "provided, that on the termination "of the current tenancy the land- "lord intends to occupy the hold- "ing for the purposes, or partly for "the purposes, of a business to be "carried on by him therein, or as his "residence. (2) The landlord shall "not be entitled to oppose an appli- "cation on the ground specified in "paragraph (*g*) of the last foregoing "subsection if the interest of the "landlord . . . was purchased or "created after the beginning of the "period of five years which ends "with the termination of the current "tenancy . . ."

By s. 31: "(1) If the landlord "opposes an application [for a new "tenancy] . . . on grounds on which "he is entitled to oppose it in accord- "ance with the last foregoing section "and establishes any of those "grounds to the satisfaction of the "court, the court shall not make an "order for the grant of a new "tenancy."

Atkinson v. *Bettison* (supra) distinguished.

J. W. Smart (Modern Shoe Repairs) Ltd. v. *Hinckley and South Leicestershire Permanent Benefit Building Society* [1952] 2 T.L.R. 684; [1952] 2 All E.R. 846 distinguished.

APPEAL from Judge Howard, sitting at Brentwood County Court.

In 1941 the former owner of shop premises at No. 72, High Street, Brentwood, Essex, let the premises to one Townend for one year and thereafter from year to year at an annual rent of £30. In 1949 Townend assigned the tenancy to the present applicant, who had since carried on business on the premises as a retailer of electrical goods. Next door, at No. 74, was a wool shop belonging to the same owner and let to a Miss Goodman. On June 22, 1954, the owner gave notice to quit to the tenant expiring on December 25, 1954. In September, 1954, he put both premises up to auction, and they were purchased by the respondent landlords. In October, 1954, the Landlord and Tenant Act, 1954, came into operation and automatically extended the tenancy of each shop until the landlords gave notice of termination in accordance with the Act. On June 10, 1955, the landlords gave notice to the tenant terminating the tenancy on December 25, 1955; they also gave a similar notice to Miss Goodman in respect of No. 74 terminating her tenancy on March 25, 1956, on which she took no action.

The tenant applied under the Act for a new lease, and, on the landlords' refusal, took proceedings in the county court, which the landlords opposed on the ground specified in section 30 (1) (*f*) of the Act, that they intended to demolish and reconstruct the premises. They wished to obtain possession of both shops in order to pull them down and put up a new shop at a cost of some £20,000 to accommodate their furnishing business. The premises were about 250 years old, of no historic interest, and very near the end of their useful life in any event.

In the county court proceedings the judge made the following findings of fact: "1. That on the determination of the tenancy " at Christmas, 1955, the respondent landlords do intend to " demolish the whole of No. 72. 2. That they cannot reasonably " do so without obtaining possession of the holding. 3. That their " object in demolishing is not to occupy the old building but to " rebuild on the site and to occupy the new buildings for the " purpose of their business as furniture retailers. 4. That they "would not have bought either 72 or 74 unless they had that "ultimate object in mind. 5. That while they intend to pull "down both buildings, they would immediately pull down No. 72 "in the hope of obtaining possession in March next of No. 74. "6. That even if they were ultimately frustrated in their desire "to obtain possession of No. 74, they would nevertheless pull "down No. 72 and make a new building there for their own "purposes with some inevitable modification of their plans."

Having so found, the judge held that the question was concluded against the landlords by the authority of *Atkinson* v. *Bettison* [2] and he granted a new lease.

The landlords appealed.

H. V. Lloyd-Jones Q.C. and *James W. Miskin* for the landlords. The important question is: What are these landlords going to do "on the termination of the current tenancy"? The judge found that the landlords had the primary and immediate purpose of demolishing the premises if they obtained possession "on the "termination of the current tenancy"; they could, therefore, never have brought themselves within paragraph (*g*) of section 30 (1) at any time; for although the landlords intended to carry on on the *site*, the structure would have been demolished: see definition of "holding" in section 23 (3) of the Act.

The county court judge would not have granted a new tenancy had it not been for the decision in *Atkinson* v. *Bettison*.[2] That decision is distinguishable, for the court was there considering an attempt to circumvent the Act, where a landlord who could not bring himself under paragraph (*g*) was seeking to slip himself in under paragraph (*f*) by indicating, on an estimate of cost not even made by a builder, that he intended to do some work on existing premises which would continue to exist after he had obtained possession for his own purposes; and Denning L.J.[3] rightly warned against the too easy assumption that a landlord has satisfied the requirements of paragraph (*f*).

[Denning L.J. The ground of objection under paragraph (*f*) can only be established when the work to be done is so substantial that business must cease and the landlords must have possession to do the work?]

Yes, that is the minimum. In the present case it is postulated that neither tenant nor landlord could carry on business there, and that it is the ultimate object of the landlord to carry on business on the holding. In *Atkinson's* case [4] the questions of primary, secondary or ancillary purposes were all relevant to the intention and the genuineness of the intention. That is not the case here for, on the judge's findings, these landlords were plainly within paragraph (*f*). Moreover, in *Atkinson's* case [4] the court applied the decision in *J. W. Smart (Modern Shoe Repairs) Ltd.* v. *Hinckley and Leicestershire Permanent Benefit Building Society*,[5] a decision on the Leasehold Property (Temporary Provisions) Act, 1951, which is quite different from the Act of 1954; and the absence of any reference to section 31 (1) of the Act of 1954 is support for the submission that the court was not in *Atkinson's* case [6] considering the limits of application of paragraph (*f*) but only the possibility of a landlord defeated by paragraph (*g*) slipping himself in under paragraph (*f*). [Dicta of Asquith L.J. in *Cunliffe* v. *Goodman* [7] on the meaning of "intention" in the Landlord and Tenant Act, 1927, were also referred to.]

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[2] [1955] 1 W.L.R. 1127; [1955] 3 All E.R. 340.

[3] [1955] 1 W.L.R. 1127, 1130.

James Stirling Q.C. and *Lord Vaughan* for the tenant. The Act of 1954 by paragraph (*f*) permits a landlord whose property is an investment to carry out reconstruction or demolition for sound business purposes to protect the investment. The question for the court is thus whether there was a real detached demolition project, apart from the landlords' intention to get possession; and the test is: What would be good business management in the circumstances? That construction of paragraph (*f*) would not work a hardship on the tenant, for a tenant is at risk if he continues in a holding which is in such condition that the landlord is able to satisfy a county court judge that unless the work is done urgently the property will become an incubus and not a profitable investment.

[PARKER L.J. Paragraph (*f*) does not say anything about good business management. It is based on intention.]

Paragraph (*f*) is concerned with bricks and mortar; paragraph (*g*) with something more than bricks and mortar, namely, the desire of the landlord to occupy; but the Act does not allow the landlord to use paragraph (*f*) as a means for obtaining entry on the premises himself. *Atkinson's* case [8] is authority for saying that primary and ancillary intentions must be considered.

[PARKER L.J. If the landlord's intention is, first, to occupy, second, to reconstruct and, third, to let to a stranger, and he satisfies the court that all three intentions are genuine, why does not paragraph (*f*) operate if the third element only is different, namely, that he wants to occupy himself at the end of the reconstruction?]

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[4] [1955] 1 W.L.R. 1127.

[5] [1952] W.N. 484; [1952] 2 T.L.R. 684; [1952] 2 All E.R. 846.

[6] [1955] 1 W.L.R. 1127.

[7] [1950] 2 K.B. 237, 250; 66 T.L.R. (Pt. 2) 109; [1950] 1 All E.R. 720.

[8] [1955] 1 W.L.R. 1127.

If the landlord wanted to let to a stranger the inference would be that it was a sound business investment, and it would be easier to prove the settled intent which the paragraph requires.

[DENNING L.J. *Atkinson's* case [8] can be supported on the simple ground that it was decided on its own facts; but if the first ground of the decision as to primary purpose is also a binding ground of decision, then, whether it is right or wrong, we cannot alter it ourselves, for the House of Lords has said that if two grounds are given for a decision both are binding.]

Atkinson's case [8] was rightly decided and is binding on this court. There are admittedly inconsistencies between paragraphs (*f*) and (*g*) arising from the use of the word "holding," which is more than the mere premises which the landlord is seeking to demolish or reconstruct. Those paragraphs cannot be read as supplemental to one another; they are inconsistent and can only be married by construing (*f*) as requiring the landlord to show that his intention is objective, to protect his asset. The tenant is entitled to rely on the preamble to the Act of 1954, which is an Act to protect tenants; and where two paragraphs may have a wholly inconsistent application, because a landlord may prove under (*f*) that he wishes to demolish or reconstruct and also admit that he wants to occupy the holding immediately, the court is bound to say: "He cannot have possession because he then "comes within paragraph (*g*) and cannot qualify under that "paragraph because he has not been the landlord for five years." On primary and ancillary purposes the present case cannot be distinguished from *Atkinson's* case.[8]

Finally, although section 31 (1) is in mandatory terms, it has to be read in conjunction with section 30 (1), some of the phraseology of which admits the exercise of discretion, e.g., the word "reasonably" in paragraph (*f*) and the word "ought" in (*a*), (*b*) and (*c*).

Lloyd-Jones Q.C. in reply. Paragraphs (*f*) and (*g*) are fundamentally different, and (*g*) is only relevant to (*f*) on the test as to intention. On sound business management, the intention to demolish and reconstruct here was a sound business proposition, and no less sound because the landlords were not going to let to a stranger but to occupy themselves. Why should a tenant be protected against a landlord who wishes to occupy himself after reconstruction? The hardship to the tenant is of no assistance in construing the material words. The first ground for the decision in *Atkinson's* case [8] merely stated in another form the second ground for the decision. In *Young* v. *Bristol Aeroplane Co. Ltd.*[9] Viscount Simon said [10] that, if the Court of Appeal had in a previous case pronounced on a point of law which necessarily covered a later case, the previous decision must be followed. None of the judgments in *Atkinson's* case [11] have pronounced on the point of law necessarily covered in the present case, for the court was not there dealing with the case which would arise where a genuine intention to demolish or reconstruct had been established to the court's satisfaction. Nor was the court in *Atkinson's* case [11] addressing itself to the question as to when it was right under section 31 (1) to make or not to make an order. The case proceeded on the assumptions, based on findings of fact, that there was not a genuine intention to demolish or reconstruct *in any event*, and certainly not " on the termination of the current " tenancy." The facts are quite different, and the decision is specific to the facts of that case.

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[8] [1955] 1 W.L.R. 1127.

As to the submission that there is an element of discretion in parts of section 30 (1), there is no such discretion in (*f*), under which the court has to decide only whether the work can reasonably be done without obtaining possession; and in *Upsons Ltd.* v. *E. Robins Ltd.*[12] Denning and Morris L.JJ.[13] said that section 30 (1) (*g*) dealt with rights and not with matters within the discretion of the court; paragraph (*f*) is equally a matter of right and not of discretion.

DENNING L.J., after stating the facts: On the judge's findings it would seem clear that the landlords have satisfied all the requirements of section 30 (1) (*f*) of the Act. But the judge went on to say this: " It is impossible for me to distinguish this case " from *Atkinson* v. *Bettison* [1] and therefore I must hold, however " reluctant I feel to do so, that the present application " (for a new lease) " succeeds." He granted Mr. Fisher a new lease for five years at £500 a year.

We have to consider, in these circumstances, the decision of this court in *Atkinson* v. *Bettison.*[1] I am sorry to find that that

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[8] [1955] 1 W.L.R. 1127.

[9] [1946] A.C. 163; 62 T.L.R. 99; [1946] 1 All E.R. 98.

[10] [1946] A.C. 163, 169.

[11] [1955] 1 W.L.R. 1127.

[12] [1956] 1 Q.B. 131; [1955] 3 All E.R. 348.

[13] [1956] 1 Q.B. 131, 138, 141.

[1] [1955] 1 W.L.R. 1127; [1955] 3 All E.R. 340.

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decision has given rise to difficulties, and, inasmuch as I was a party to that decision, I should like to explain it. The correct ground of the decision was that the proposed work was not "substantial" within section 30 (1) (*f*); but the court considered also section 30 (1) (*g*) and (2), which says that if the landlord wants to get possession for his own purposes, he must have been owner for the last five years. In this connexion the court gave an emphatic warning against allowing a landlord too easily to escape from the five years' rule. That is the full extent of *Atkinson* v. *Bettison*,[2] and it should not be taken to decide anything more. I there said that the landlord[3] "should not "be allowed to circumvent that provision [the five-year rule] by "putting forward a secondary purpose as though it were the main "purpose."

The sort of case which I had in mind was where a landlord wants to get possession of a shop for his own business and for that reason buys it over the tenant's head a year or so before the lease comes to an end. He knows that he cannot oppose a new lease under section 30 (1) (*g*) because he bought the property less than five years before the end of the tenancy. So he puts forward a case for reconstruction under section 30 (1) (*f*), hoping to get possession on that ground. In such circumstances the court must be careful to see that section 30 (1) (*f*) is fully satisfied before it allows him to get possession. For this purpose the court must be satisfied that the intention to reconstruct is genuine and not colourable; that it is a firm and settled intention, not likely to be changed; that the reconstruction is of a substantial part of the premises, indeed so substantial that it cannot be thought to be a device to get possession; that the work is so extensive that it is necessary to get possession of the holding in order to do it; and that it is intended to do the work at once and not after a time. Unless the court were to insist strictly on these requirements, tenants might be deprived of the protection which Parliament intended them to have. It must be remembered that if the landlord, having got possession, honestly changes his mind and does not do any work of reconstruction, the tenant has no remedy. Hence the necessity for a firm and settled intention. It must also be remembered that the Act is intended for the protection of shopkeepers, and that this protection would be nullified if a big concern could buy the property and get possession by putting in, say, a new shop-front. Hence the necessity for the work being substantial.

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[2] [1955] 1 W.L.R. 1127.

[3] Ibid. 1130.

Whilst I adhere to the view that the landlord should not be allowed to circumvent the five-year rule by putting forward a colourable case of reconstruction, nevertheless I think it is going too far to say that the work of reconstruction must be the primary purpose. The word "primary" is taken from the judgment of this court in *J. W. Smart (Modern Shoe Repairs) Ltd.* v. *Hinckley and Leicestershire Permanent Benefit Building Society*.[4] It was perfectly accurate in that connexion. The 1951 Act contained temporary provisions which only extended the lease for a year or two, and so a landlord ought not to be allowed to get possession unless there was an overpowering necessity for the work to be done at once. The 1954 Act contains permanent provisions to which different considerations apply.

In many cases the landlord will have two purposes, both of which are genuine and important: the one is to get possession for his own business, and the other is to reconstruct the premises. He does not lose the benefit of section 30 (1) (*f*) simply because he bought the premises less than five years before. Suppose a man buys up derelict premises and the only sensible thing is to pull them down at once and rebuild. If he intends to let them to a new tenant, he clearly can rely on section 30 (1) (*f*). He should not be debarred from so doing simply because, instead of letting them, he intends to occupy them himself. The legal position is made clear by section 31 (1), which says that, if the landlord establishes *any* of the grounds set out in section 30 (1), a new lease must be refused. The fact that he cannot establish one ground does not prevent him from relying on another.

Applying these principles, I think that the case of *Atkinson* v. *Bettison*,[5] properly understood, did not prevent the judge giving effect to the view which he had formed. I think the appeal should be allowed and a new lease refused.

MORRIS L.J. The county court judge made clear findings of fact. My Lord has read the tabulated reasons which are recorded in his judgment, and therefore I do not repeat them. On those findings the ground of opposition referred to in section 30 (1) (*f*) of the Act of 1954 was in my judgment established. Those words read: "that on the termination of the current tenancy the "landlord intends to demolish or reconstruct the premises com-"prised in the holding or a substantial part of those premises or "to carry out substantial work of construction on the holding

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[4] [1952] W.N. 484; [1952] 2 T.L.R. 684; [1952] 2 All E.R. 846.

[5] [1955] 1 W.L.R. 1127.

"or part thereof and that he could not reasonably do so without "obtaining possession of the holding."

The opening words are to be noted—the words "that on the "termination of the current tenancy the landlord intends." There must, therefore, be an intention and it must be an intention which in point of time is related to the termination of the current tenancy.

It seems to me that the intention must be to do one of the following things: (1) to demolish the premises comprised in the holding. Pausing there, it is to be noted that in section 23 (3) is a definition of the expression "the holding." It reads: "In "the following provisions of this Part of this Act the expression "'the holding', in relation to a tenancy to which this Part of "this Act applies, means the property comprised in the tenancy, "there being excluded any part thereof which is occupied neither "by the tenant nor by a person employed by the tenant and so "employed for the purposes of a business by reason of which the "tenancy is one to which this Part of this Act applies."

Or (2) to reconstruct the premises comprised in the holding; or (3) to demolish a substantial part of the premises comprised in the holding; or (4) to reconstruct a substantial part of the premises comprised in the holding; or (5) to carry out substantial work of construction on the holding; or (6) to carry out substantial work of construction on a part of the holding.

If the landlord proves an intention to do one of those things, and to do it on the termination of the current tenancy, he must then prove that he could not reasonably do it without obtaining possession of the holding.

Section 31 (1) must then be considered. It reads: "If the "landlord opposes an application under subsection (1) of section "twenty-four of this Act on grounds on which he is entitled to "oppose it in accordance with the last foregoing section and "establishes any of those grounds to the satisfaction of the court, "the court shall not make an order for the grant of a new "tenancy."

Words to be noted are "and establishes any of those grounds "to the satisfaction of the court." In the present case the first two findings of the county court judge were as follows: "1. That "on the determination of the tenancy at Christmas, 1955, the "respondent landlords do intend to demolish the whole of No. 72. "2. That they cannot reasonably do so without obtaining "possession of the holding."

Why, then, should the landlords not succeed in opposing their tenant's application? Mr. Stirling submits two reasons: in the first place he submits that a landlord can only succeed in his opposition under section 30 (1) (*f*) if the proposed works owe their planning and inception to the dictates of sound estate management, or, stated otherwise, that, viewed in detachment and unrelated to any intention to occupy, the landlord has the objective aim of protecting the asset of which he is owner.

But I do not find in the section any wording which warrants these submissions. The landlord must show that he has an intention as laid down. If he shows that he has and that he could not reasonably carry it out without obtaining possession of the holding, then he succeeds in his opposition.

In the second place Mr. Stirling submits that the decision in *Atkinson* v. *Bettison* [6] is of assistance to him. In my judgment it is not. That case must be read in relation to its own facts. It was a case where there was an attempt to circumvent the provisions of the Act. It cannot be interpreted in a way which would run counter to the language of the Act. The case might have been decided solely on the ground that there was evidence to support the finding of the county court judge that the works proposed did not constitute a reconstruction of a substantial part of the premises. It was a case where the landlord wanted to occupy the premises himself in order to carry on his business there. He could not rely on section 30 (1) (*g*) because he had not owned for five years. His case was, therefore, put forward under section 30 (1) (*f*). In dealing with his appeal this court made reference to an earlier decision of the court, *J. W. Smart (Modern Shoe Repairs) Ltd.* v. *Hinckley and Leicestershire Permanent Benefit Building Society*,[7] which arose under the Leasehold Property (Temporary Provisions) Act, 1951. Citations were made from the judgments there delivered. When analysed, it seems to me that the passages cited had reference to the question whether the landlords had proved what it was necessary for them to prove. So in *Atkinson* v. *Bettison* [8] the citations were similarly directed to that question. In *Smart's* case [9] the statutory provision in question was as follows: "that the landlord reasonably requires possession in "order that the premises the subject of the expiring tenancy, "or a substantial part of those premises, may be demolished or "reconstructed." Evershed M.R., in the course of his judgment, said this [9]: "When, however, we come to paragraph (*c*) it is said,

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[6] [1955] 1 W.L.R. 1127.
[7] [1952] 2 T.L.R. 684.
[8] [1955] 1 W.L.R. 1127.
[9] [1952] 2 T.L.R. 684, 686.

"as regards the reasonableness there imported, that it is particularly referable to the landlord's side of it, so to speak. The "language is: 'the landlord reasonably requires' and Mr. Grove "put it somewhat in this fashion, that the requirement must not "be capricious but for good sound business reasons. I find it "unnecessary to attempt anything by way of a definition, which "would perhaps but tend to confuse, for the judge has made it "plain that, whether or not in other respects the landlords "were reasonable, it cannot really be said that the possession "of these premises is required in order that they may be "demolished or reconstructed."

In other words, the landlords had not proved that they reasonably required possession in order that the premises or a substantial part of them might be demolished or reconstructed.

Later on in his judgment the Master of the Rolls said this[10]: "When the evidence is examined, I think it is quite plain that "that kind of condition, if I have correctly interpreted the "requirements of the paragraph, is not satisfied. It is quite "true that if possession of Smart's shop is obtained, then by the "necessary internal re-arrangements, including some structural "work, the office premises, now no doubt somewhat cramped, of "the building society will be expanded and made much more "commodious; and all the more so since their agent appears to be "able to carry on, and carries on, in addition to acting on behalf "of the building society, the independent professions of an estate "agent and an accountant, or at any rate one of them, on the "premises.

"But, as the judge himself has stated, this work of adaptation, with its structural components is, after all, but ancillary "to the desire of the landlords themselves to occupy the shop "and to make that occupation more commodious; and it is, I "think, untrue to say on the evidence, in the ordinary use of "language, that there is here in immediate prospect a reconstruction scheme. As the witnesses conceded, though the plans "have been prepared, that is as far as the matter has progressed. "There is no evidence that any costing has been done; indeed, "the architect said that he had not been asked to cost the work. "The vital matter has not yet been decided. It is obvious, "therefore, that the question of this work is still in a very "early stage, and (as the judge said) it really becomes impossible "to say that to grant an extension of Smart's occupation for

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[10] [1952] 2 T.L.R. 684, 687.

"12 months could, in any proper sense of the term, stand in the "way of or defeat a reconstruction."

Again it seems to me that this shows that the landlords had not proved what it was necessary for them to prove.

The Master of the Rolls later quoted the two following passages from the judgment of the county court judge: first,[11] "The applicants say that the landlord must show that he requires "possession for the purposes of reconstruction, and that such "requirement is reasonable; the subsection does not say that the "landlord is entitled to possession if he reasonably requires it "for his own occupation. There is no provision in the Act com- "parable to provisions in the Act of 1927 and the Rent Restric- "tions Act, that a landlord who reasonably requires possession "for his own occupation is entitled thereby to defeat an "application for a new tenancy."

And lastly,[12] "In my view, the construction placed on the "subsection by the applicants is the correct one. . . . I think that "in the present case the primary and real object for which the "respondents require possession of these premises is for occupa- "tion by Cockshaw [the agent], and that the reconstruction "contemplated by them is only ancillary to that occupation, and "is therefore not the real reason for requiring possession."

If the landlords' real reason for wanting possession was that they wanted to occupy them, then they failed to prove that their reason was that they reasonably required possession for purposes of demolition or reconstruction. The phrases which have their origin in the judgment of the county court judge in *Smart's* case [13] and which were repeated and were employed in *Atkinson* v. *Bettison* [14] are only of assistance where employed in the process of deciding whether necessary proof is forthcoming. Where, as in section 30 (1) (*f*), proof of an intention is to be supplied, and of an intention related to a particular time, then the genuineness of a declared intention may have to be decided. Considerations as to what may be a landlord's "primary purpose," or his "real intention," or his "main purpose," or his "secondary "purpose," or his "real reason" (to quote phrases which have been used), are only of relevance and assistance in the course of deciding whether the landlord has proved that he genuinely has an intention of doing one of the things specified in section 30 (1) (*f*), and of doing it on the termination of the current tenancy. If the landlord proves his intentions and proves them to the satisfaction of the court, and proves that in order to carry them out he must have possession of the holding, then his opposition succeeds, and it matters not that after demolition or reconstruction or construction according to his proved intention he proposes himself to be in occupation; but his intentions under section 30 (1) (*f*) must be genuine and not spurious or specious, and they must be to do what the words of the section describe, and to do it at the time denoted.

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[11] [1952] 2 T.L.R. 684, 688.

[12] Ibid. 688.

[13] Ibid.

[14] [1955] 1 W.L.R. 1127.

If a case occurs in which it appears that a landlord had a desire to obtain possession for his own occupation, and had no thought at all of making any alteration to the premises, but if, after realizing that because he had not owned for five years, he could not oppose an application of his tenant for a new lease, he then proclaimed an intention to reconstruct, the court would have to decide whether the newly proclaimed intention was genuine. It certainly could be entirely genuine even though it owed its birth to a realization of the effect of section 30 (2) upon a desire and intention coming within section 30 (1) (*g*); but the circumstances would call for careful examination. Intentions can easily be asserted: their genuineness must be established. In such examination the only inquiry would be and must be as to whether the landlord had proved an intention which brings him within the language of section 30 (1) (*f*). Any consideration of primary and secondary purposes, where any such consideration can occur and is helpful, must always be subordinate to an inquiry directed to the actual words of the section.

Accordingly, I would allow the appeal.

Parker L.J. I have come to the same conclusion. So far as this appeal is concerned, the relevant provisions of the Act are section 29 (1), section 30 and section 31 (1). Section 29 (1) provides that: "Subject to the provisions of this Act, on an "application under subsection (1) of section twenty-four of this "Act for a new tenancy the court shall make an order for the "grant of a tenancy comprising such property, at such rent and "on such other terms, as are hereinafter provided."

Section 30 (1) says that "The grounds on which a landlord "may oppose an application under subsection (1) of section "twenty-four of this Act are such of the following grounds as "may be stated in the landlord's notice under section twenty-five "of this Act or, as the case may be, under subsection (6) of "section twenty-six thereof, that is to say . . ." And thereafter are set out seven grounds of opposition, many of which leave a certain discretion in the courts; others do not.

The only two grounds relevant to this appeal are contained in paragraphs (*f*) and (*g*). Paragraph (*f*) provides " that on the " termination of the current tenancy the landlord intends to " demolish or reconstruct the premises comprised in the holding or " a substantial part of those premises or to carry out substantial " work of construction on the holding or part thereof and that he " could not reasonably do so without obtaining possession of the " holding."

Paragraph (*g*) is: " subject as hereinafter provided, that on " the termination of the current tenancy the landlord intends to " occupy the holding for the purposes, or partly for the purposes, " of a business to be carried on by him therein, or as his " residence."

By subsection (2) a landlord is debarred from relying on ground (*g*) if, broadly speaking, he has become the landlord within the preceding five years.

Finally, section 31 (1) provides that: " If the landlord opposes " an application under subsection (1) of section twenty-four of " this Act on grounds on which he is entitled to oppose it in " accordance with the last foregoing section and establishes any " of those grounds to the satisfaction of the court, the court shall " not make an order for the grant of a new tenancy."

From the scheme of the Act as there laid down I should have thought that it was clear, apart from authority, that if any of those grounds of objection is established, the tenant's application for a new lease must fail. Each ground is entirely separate and independent, and each, if proved, entitles the landlord to succeed. Thus, if ground (*f*) is proved to the satisfaction of the court, it matters not to what use the landlord ultimately intends to put the holding. He may intend to let it when the work is done to a third party. He may intend ultimately to occupy it himself for his own business; or he may not have made up his mind at all. To suggest that, if his intention is ultimately to occupy it himself and he cannot by reason of subsection (2) of section 30 rely on ground (*g*), he is thereby debarred from relying on ground (*f*), is to apply a proviso to the operation of ground (*f*) which is not there and for which there is no warrant. Of course, if he finds himself debarred from relying on ground (*g*) and is forced to rely on ground (*f*), his task will not be an easy one; it will at once be suspected that his alleged intention is not genuine, and that it is merely put forward to circumvent his inability to rely on ground (*g*). But assuming that he satisfies the court that the intention is genuine I can see no reason why he should be debarred from relying on ground (*f*). To succeed, however, he must establish his case under the paragraph. Thus, not only must he satisfy the court that the intention is genuine, but also that it was firm and settled, and that (to use the words in *Cunliffe* v. *Goodman*[15]) it had "moved out of the zone of con- "templation—the sphere of the tentative, the provisional and the "exploratory—and had moved into the valley of decision."

He must further prove not only that he intends to demolish or reconstruct, as there set out, but also that "he could not "reasonably do so without obtaining possession of the holding." This latter stipulation qualifies the nature and extent of the work. If, however substantial the operation, it can be done with the tenant still in possession, the landlord has not made out his ground of objection. Thus, if it is shown that the landlord intends to occupy the holding at once for the purposes of his business and thereafter, while he is carrying on business, to do substantial work, he has not made good his ground of objection. For if it is reasonably possible to do the work while he is in occupation, it is equally reasonably possible for him to do it while the tenant is in occupation.

Mr. Stirling, however, urged for the tenant that in order to rely on ground (*f*) the landlord must show that his intention to do the work is based on principles of good business management or of sound economics. Again, I can see no warrant for introducing any such implied limitation on the express words of the paragraph. No doubt if a landlord alleged an intention to pull down perfectly sound and useful buildings, that intention would be suspect and make it harder for him to establish the genuineness of his alleged intention, but it is another thing to say that, however genuine his intention, he cannot succeed unless he can show that the proposed work is consistent with good business management.

Turning to the facts of the present case the county court judge has found, and indeed it is conceded, that the landlords genuinely intend to demolish the premises, which clearly cannot reasonably be done without obtaining possession of the holding. I cannot think that, for the reasons I have given, it can make any difference that the landlords ultimately intend to occupy the holding for the purpose of their business.

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[15] [1950] 2 K.B. 237; 66 T.L.R. (Pt. 2) 109; [1950] 1 All E.R. 720.

The county court judge, however, held, and it was urged before us that the question was concluded by authority against the landlords. It was said that this court in *Atkinson* v. *Bettison*[16] had, to use the words of Viscount Simon in *Young* v. *Bristol Aeroplane Co. Ltd.*,[17] "pronounced on a point of law "which necessarily covers a later case coming before the court," namely, the present case.

Having regard to what my Lords have said about *Atkinson* v. *Bettison*,[18] with which I entirely agree, I do not propose to consider the words used in that case in detail. It is enough for me to say that I am quite clear that that case cannot be read as laying down that where a landlord desires ultimately to occupy the holding, but cannot rely on ground (*g*), he is automatically debarred from relying on ground (*f*), even though he proves that his genuine and settled intention is to demolish the whole of the premises forthwith on the determination of the current tenancy.

I would allow the appeal.

Appeal allowed.

Solicitors: *Bird & Bird for H. J. Jefferies & Co., Southend-on-Sea; Torr & Co. for Stamp Wortley & Co., Brentwood.*

F. R. D.

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[16] [1955] 1 W.L.R. 1127.

[17] [1946] A.C. 163, 169; 62 T.L.R. 99; [1946] 1 All E.R. 98.

[18] [1955] 1 W.L.R. 1127.

LAW SOCIETY *v.* ELDER.

[LO. No. 4861.]

C. A.
1956
Mar. 21.

Lord Evershed M.R., Denning and Birkett L.JJ.

Legal Aid—Certificate—Validity—Certificate granted to take proceedings limited to obtaining counsel's opinion—Adverse opinion—No proceedings taken—Validity of certificate—Meaning of "proceedings"—Proceedings contemplated—Default in payment of contributions—Legal Aid and Advice Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 51), *s.* 1 (5)—*Legal Aid (General) Regulations,* 1950 (*S.I.* 1950, *No.* 1359), *reg.* 11 (2).

By section 1 (5) of the Legal Aid and Advice Act, 1949: "Legal "aid shall consist of representation, on the terms provided for by "this Part of this Act, by a solicitor and so far as necessary "by counsel (including all such assistance as is usually given by "solicitor or counsel in the steps preliminary or incidental to any "proceedings . . .)."

The defendant applied for legal aid to proceed in the Chancery Division for a declaration granting him full United Kingdom citizenship. He agreed to contribute £38 towards the cost and was granted a civil aid certificate which was expressly limited to obtaining counsel's opinion. The opinion of counsel was taken, but as it was to the effect that the defendant's contention was unlikely to be successful in the courts, no proceedings were taken. The defendant defaulted in payment of the agreed instalments of his contribution and sought to resist a claim by the plaintiffs for the sum unpaid on the ground that the legal aid certificate which had been granted to him was invalid because it was not granted for or in connexion with proceedings, but for the purpose of taking the advice of counsel, and that, accordingly, the plaintiffs could not require him to pay his assessed contribution:—

Held, that the word "proceedings" in section 1 (5) included proceedings bona fide contemplated, and was not limited to proceedings which had been actually begun; and that, since the defendant was on reasonable grounds in suggesting the initiation of proceedings, the certificate in question was rightly granted and valid, notwithstanding that it was limited to obtaining counsel's opinion.

Semble, irrespective of the validity of the certificate, the defendant had contracted to pay the contribution and was liable for it in any event.

APPEAL from Judge Pugh sitting at Bloomsbury County Court.

I. J. B. Elder (hereafter called "the defendant") sought legal aid towards the cost of bringing proceedings to establish that, although he and his father had both been born in India, he was, by virtue of section 12 (4) of the British Nationality Act, 1948, a citizen of the United Kingdom. He signed a form of acceptance of an offer of civil aid on which he agreed to contribute £38 towards the costs, £2 5s. being payable on acceptance and the remainder by monthly instalments. He was then granted a certificate which read: "This is to certify that [the defendant] "is entitled, in accordance with the Legal Aid and Advice Act, "1949,[1] and the regulations and scheme made thereunder, to "legal aid as plaintiff in connexion with the following proceedings: As plaintiff in the High Court of Justice, Chancery "Division, to take proceedings for a declaration granting full "United Kingdom citizenship under the provisions of section 12 "(4) of the British Nationality Act, 1948. Limited to obtaining "opinion of leading counsel versed in constitutional law." The opinion of Mr. D. N. Pritt Q.C. was taken. Mr. Pritt expressed sympathy with the defendant's contention, but concluded that it was not sustainable in the courts and he advised the defendant to apply for registration. The defendant defaulted in payment of the agreed monthly instalments, so that the civil aid certificate became liable to be discharged. The Law Society thereupon took out a summons in the county court, claiming £35 15s., the unpaid balance of the contribution (the total expenditure which they had incurred in obtaining counsel's opinion being over £80). The defendant unsuccessfully resisted the claim, the county court judge holding that there was no defence to the action. The defendant appealed.

The defendant I. J. B. Elder in person.

Rodger Winn for the plaintiffs, the Law Society. The point taken by the defendant as to the validity of the certificate is in this case academic, for he has signed a form of acceptance of legal aid (Form B.2) which constitutes a contract in writing, accepting the conditions on which that aid should be granted to him.

The certificate is in any case valid, for "proceedings" in section 1 (5)[1] of the Legal Aid and Advice Act, 1949, includes proceedings which are bona fide contemplated as well as existing proceedings. If this were not so, the purpose and object of the legislation would be very largely frustrated. It is within the discretion of the committee of the Law Society to decide whether counsel's opinion should be taken before an action is launched at public expense. It is common ground that the question of taking proceedings had arisen in this case.

The submission that it is open to the committee to limit the

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[1] Legal Aid and Advice Act, 1949, s. 1: "(5) Legal aid shall consist of "representation, on the terms provided "for by this Part of this Act, by a "solicitor and so far as necessary by "counsel (including all such assist- "ance as is usually given by solicitor "or counsel in the steps preliminary "or incidental to any proceedings or "in arriving at or giving effect to a "compromise to avoid or bring to an "end any proceedings)."

S. 5: "(1) This section provides "for, and (except for subsection (6)) "relates only to, legal aid in taking "steps to assert or dispute a claim "where—(*a*) the question of taking, "defending or being a party to pro- "ceedings before a court or tribunal "does not arise or has not yet arisen; "but (*b*) if it did arise, the proceed- "ings would, or might properly, be "such that legal aid could be given in "connexion therewith under section 1 "of this Act. (2) Legal aid under "this section shall consist of the "assistance of a solicitor on the terms "provided for by this section . . . "(3) A person shall not be given legal "aid under this section unless he "shows that he has reasonable "grounds for taking steps to assert "or dispute the claim. . . . (6) Where "a person receives legal aid under "this section in any matter and, on "that matter giving rise or appearing "likely to give rise to proceedings, he "is given legal aid also in connexion "with those proceedings, then, except "in so far as regulations otherwise "provide, section 3 of this Act shall "apply as if all the legal aid had "been received in connexion with the "proceedings."

S. 7: "(1) Subject to this Part of "this Act, legal advice shall be avail- "able in England and Wales for any "person, and outside Great Britain for "any member of the forces. (2) Legal "advice shall consist of oral advice "on legal questions given by a solici- "tor employed whole time or part "time for the purpose. . . ."

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certificate is borne out by regulation 5, which refers to a certificate in respect of "the whole or a part of the proceedings."

Section 5 (2) and section 7 of the Act of 1949 are not yet in force and they would not apply to this type of case, since both relate to oral advice given by solicitors.

It was formerly the practice to cause a writ to be issued and then to limit the extent. But that procedure was thought to involve unnecessary expense. If in the present case a writ had been issued, the result would be the same but about £10 would have been added to the cost.

LORD EVERSHED M.R., having stated the facts, and referred to regulation 11 (2) (*b*) of the Legal Aid (General) Regulations, 1950,[1] continued: Mr. Rodger Winn, for the Law Society, takes the point that there is a short and conclusive answer to the defendant's objection based on the fact that, pursuant to ordinary practice (and indeed to the regulations), the defendant executed a form (Form B.2) of acceptance of an offer of a civil aid certificate which created a contract, whatever objections there are or may have been to the validity of the grant of the certificate. I confess that to my mind that seems a very formidable point. But it may be desirable that I should express a view upon the somewhat wider contention raised by the defendant, which is of some public significance, and I do not, therefore, rest my conclusion on what I will call the contract point.

The wider point on which the defendant told us he really rested his case follows upon the effect of section 1 of the Act, and in particular subsection (5) of that section. [His Lordship read the subsection.] Briefly, the point taken by the defendant is this. He says that the certificate was in truth an evasion of the purposes of the Act, a subterfuge; it merely granted, or purported to grant, legal aid for the purpose of taking advice of counsel, and not for or in connexion with proceedings at all; and that the certificate being, therefore, invalid, it is impossible for the Law Society to sue for the sum assessed as his contribution thereunder. I pointed out to the defendant (and I only repeat it in case it should be perhaps of some comfort to him) that, if he were right about this point, it would appear that he would be liable not merely for the £35, but for the full costs incurred on his behalf by the solicitors concerned. But I have come to the conclusion that, though at first sight that argument might appear not to be without attraction, it is in truth unsound.

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[1] Legal Aid (General) Regulations, 1950 (S.I. 1950, No. 1359), reg. 11: "(2) The appropriate Area Committee "may discharge a certificate . . . (*b*) "where an assisted person has been "required to make a contribution and "any payment in respect thereof is "more than 21 days in arrear."

The form of the certificate was for the purpose of aiding the defendant as plaintiff in proceedings in the Chancery Division. No proceedings were, in fact, ever taken, and it is that fact, of course, that lends colour to the argument of the defendant that this certificate was somewhat of a subterfuge. It is also to be noted that, under other sections of the Act, that is by sections 5 and 7, provision is made for the granting of advice (in each case by a solicitor only). Neither of those sections has as yet come into operation; but, as Denning L.J. observed during the argument, it is not irrelevant to have them in mind in construing section 1 (5), and I have them in mind. But I am far from persuaded that section 1 (5) can be related only to cases in which proceedings are actually started. I think, indeed, the circumstance that sections 5 and 7 are limited to advice by solicitors, that the matters referred to in section 5 are concerned with questions when proceedings before a court do not arise, or have not arisen, and that section 7 is limited to oral advice on the part of a solicitor, make it plain that, if a sensible result is to be given to the parliamentary provisions, section 1 must cover the case where proceedings are genuinely contemplated as being the appropriate step then to be taken, but have not yet in fact been taken. In other words, I think that the word "proceedings" in section 1 (5) must mean proceedings in existence, or then bona fide contemplated.

That view, I think, is supported also by the parenthesis which I have already read: "(including all such assistance as is usually "given by solicitor or counsel in the steps preliminary or inci-"dental to any proceedings)." Mr. Winn told us that at one time ex abundanti cautela a writ or other process was issued so as to put proceedings in train, and then a limitation was imposed for getting advice before the real expenses of the proceedings were incurred. But now, in a case such as this, although the certificate is expressly related to contemplated proceedings, the advice which qualifies the certificate is to be taken first; and, as I have said, for the very good purpose of seeing whether, in the end of all, it will be proper to expend public money on the prosecution of those contemplated proceedings. I am of opinion, therefore, that section 1 (5) is not limited to cases where proceedings have actually been started.

It is said by the defendant that the course of events in this case involves the Law Society in something of a dilemma: either the contemplated proceedings had reasonable grounds, or they had not. If they had not, then by section 1 (6) the grant of legal aid would be outside the scope of the Act. If they had reasonable grounds, then why were they not proceeded with? The opinion of one counsel is not the same as the judgment of a court. Again I am not able to accept the defendant's view. I think that what I have already said would satisfy most people that in suggesting the initiation of proceedings to establish British citizenship, the defendant was on reasonable grounds, and the committee of the Law Society rightly granted the certificate on that premise. But the weighty opinion which was received caused later the equally valid conclusion, as I think, that such proceedings which would have been regarded originally as reasonable could no longer be regarded as reasonable so as to involve the further expenditure of public money thereupon.

I therefore think that no ground of invalidity in the certificate is made out by the defendant; and that being the real substance of his appeal, it follows, as I think, that we must dismiss it.

DENNING L.J. I agree. On the first reading of section 1 (6) it would seem that the defendant has a good point, for that subsection says: "A person shall not be given legal aid in "connexion with any proceedings unless he shows that he has "reasonable grounds for taking, defending or being a party "thereto." Read by itself, that would seem to limit legal aid to proceedings which were actually in existence. That argument is reinforced by saying that legal aid or advice in matters not yet involving litigation is dealt with by sections 5 and 7, which are not yet in force. But on reading the whole of the sections to which the Master of the Rolls has referred, it becomes clear that the word "proceedings" here means not only proceedings in being, but also contemplated proceedings; and that subsection (6), read in relation to subsection (5), means that a person can get legal aid when he has reasonable grounds for taking counsel's opinion in regard to contemplated proceedings. That being so, the defendant's point turns out to be not a good one. I agree that the appeal should be dismissed.

BIRKETT L.J. I am entirely of the same opinion, and I do not desire to add anything to the judgments which have been delivered.

Appeal dismissed.

Solicitors: *James & Charles Dodd.*

E. D.

OWEN *v.* GADD AND OTHERS.

[Plaint No. L. 1187.]

C. A.

1956
Mar. 23, 26.

Lord Evershed M.R., Birkett and Romer L.JJ.

Landlord and Tenant — Covenant — Covenant for quiet enjoyment — Demise of lock-up shop—Scaffolding erected in front of demised premises by landlord—Breach of covenant.

By a lease of October 13, 1955, landlords demised to the plaintiff a lock-up ground floor shop, reserving to themselves the floor above the shop. The tenant covenanted to use the demised premises for certain specified retail trades and the lease containd a common form covenant by the landlords for quiet enjoyment. Three days after the grant of the lease, contractors, instructed by the landlords, erected on the pavement in front of the shop scaffolding for the purpose of carrying out repairs to the landlords' upper premises. It was not disputed that the access to the tenant's shop and the shop window was to some extent obstructed by the scaffolding. The landlords did what they could to minimize the damage and the repairs were completed and the scaffolding removed in under a fortnight. The tenant claimed damages for breach of the landlords' covenant for quiet enjoyment. The county court judge held that the erection of the scaffold poles in close proximity to the shop window constituted a breach of the covenant for quiet enjoyment, but he held that no special damage had been proved and awarded to the plaintiff 40s. damages. The landlords appealed:—

Held, (1) that although, to constitute a breach of such a covenant there must be some physical interference with the enjoyment of the demised premises, and the interference must be substantial, there could be a breach of such covenant without an actual physical irruption into or upon the demised premises on the part of the landlord or some person authorized by him.

(2) That the question whether the quiet enjoyment of the demised premises had been so interrupted was one of fact and the judge in the present case was entitled to find, as a fact, that the scaffold poles constituted a substantial interference with the demised premises.

Dicta of Fry L.J. in *Sanderson* v. *Berwick-upon-Tweed Corporation* (1884) 13 Q.B.D. 547, 550, 551 and of Parker J. in *Browne* v. *Flower* [1911] 1 Ch. 219, 228 considered.

Appeal from Judge Reid, sitting at Kingston-upon-Thames County Court.

By a lease dated October 13, 1955, the defendants Arthur Gadd, K. J. Leonard and Richard B. Caws, who carried on the business of estate agents as Nightingale, Page and Bennett, demised to the plaintiff, Harold Owen, a lock-up shop, No. 16, Eden Street, Kingston-upon-Thames, for a term of 10 years from June 25, 1955, at a rent of £700 a year and a further insurance rent.

The lease contained a covenant by the tenant to use the premises for the retailing of baby carriages, radio sets and accessories, and toys, and for no other purpose. The landlords covenanted: "And that the lessee paying the rent hereby reserved and performing and observing the several covenants conditions and agreements herein contained and on his part to be performed and observed shall and may peaceably and quietly hold and enjoy the said premises hereby demised during the term hereby granted without any lawful interruption or disturbance from or by the lessors or any person or persons claiming under them or either of them."

The landlords had retained the first floor premises above the demised premises and three days after the grant of the lease contractors, instructed by the landlords, erected scaffolding on the pavement immediately in front of the shop window and door of the demised premises for the purpose of carrying out repairs to the landlords' premises. The tenant protested, and the work was completed in 11 days instead of the six weeks originally contemplated. The week during which the scaffolding was in place was the week preceding a budget statement when shops doing a similar trade had, it appeared from the evidence, done a largely increased trade owing to fears of increased purchase tax. The tenant's trade had shown no similar increase.

The tenant claimed damages for breach of the landlords' covenant for quiet enjoyment. The county court judge held that the erection of scaffold poles constituted a breach of the covenant for quiet enjoyment but, in spite of some evidence of loss of trade, he held that no special damage had been proved and he awarded to the lessee 40s. damages.

The landlords appealed.

Stephen Chapman Q.C. and *John D. May* for the landlords. On the facts which the judge found there was no basis for holding that the landlords had committed a breach of the covenant for quiet enjoyment. The judge accepted that all the work done was necessary and that the landlords had acted reasonably in having it done, having regard to the advice of their architect. The work was carried out with all reasonable speed and every effort was made to minimize the interference with the tenant's business. The covenant for quiet enjoyment deals with disturbance in relation to possession. The authorities show that for there to be a breach, there has, prima facie, to be something in the nature of an invasion of the demised premises for which the landlord is responsible. What Fry L.J. said in *Sanderson* v. *Berwick-upon-Tweed Corporation*[1] must be confined to that particular context. Adjoining owners must put up with many things. For example, an adjoining owner may decide to demolish his property and, although that will almost inevitably cause dust and noise, he is entitled to do it. So long as what is done is kept within reasonable bounds, it is not a nuisance as between adjoining owners, and it is submitted that it could not, as between a landlord and his tenant, amount to a breach of the covenant for quiet enjoyment. There was no substantial interference with the physical enjoyment of the premises by the tenant in this case. There is no evidence that any part of the scaffolding even touched any part of the demised premises. There was nothing here which prevented potential customers from looking into the tenant's shop windows. The complaint is that the scaffolding prevented the tenant from increasing his trade as he had hoped; but mere interference with a particular mode of user, short of ouster of possession, is not sufficient: *Dennett* v. *Atherton*.[2] The cases show that there must be physical interference.

All the facts are before this court, which can appreciate the situation as well as the county court judge could do. To be a breach of the covenant there must be some physical interference with the demised premises. Conduct on the landlord's land, such as noise, does not constitute a breach of the covenant: *Jenkins* v. *Jackson*.[3] The erection of a barrier of a temporary character, which is reasonably necessary for the proper use of the landlord's adjoining land, does not constitute a breach of the covenant. This appears from the decision in *Manchester, Sheffield and Lincolnshire Railway Co.* v. *Anderson*.[4] If a landlord satisfies the court that his operations are necessary, and they are carried on outside the demised premises, the tenant has no redress. The covenant does not prevent the landlord carrying out necessary repairs to his own land. There is no case in which it has been held that conduct by a landlord, which merely causes a loss of amenity to the tenant, constitutes a breach of the covenant for quiet enjoyment. [Reference was made to *Davis* v. *Town Properties Investment Corporation Ltd.*[5] and *Browne* v. *Flower*.[6]]

If a landlord demises property for a specific purpose, he is precluded from doing anything which would render the premises unfit for that purpose, since to do so would amount to a derogation from his grant. When it is stated in the authorities that a "physical" interference with the demised property is necessary to constitute a breach of a landlord's covenant for quiet enjoyment, it is submitted that what is meant is some actual physical irruption on to them. In the covenant "quiet enjoyment" does not mean what the man in the street would understand by that phrase. It means that the tenant's possessory rights shall not be impaired. The present case involves an important question for landlords, for, if what the landlords did in this case is held to be a breach of their covenant, it would seem that it will be necessary for the form of leases to be amended.

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[1] (1884) 13 Q.B.D. 547, 550.

[2] (1872) L.R. 7 Q.B. 316.

[3] (1888) 40 Ch.D. 71.

[4] [1898] 2 Ch. 394; 14 T.L.R. 489.

[5] [1903] 1 Ch. 797.

[6] [1911] 1 Ch. 219.

It is admitted that what the landlords did here did interfere to some extent with the free access of customers to the tenant's premises. What was done was wholly outside the demised premises, and the authorities distinguish between what is done on the demised premises and what is done outside them. If a landlord can show that what was done outside the demised premises was reasonable, a tenant can only complain if the act complained of is of long duration. The landlords here have discharged the onus which was on them of showing that what they did was reasonable. Accordingly, the erection of this scaffolding was not a breach of their covenant for quiet enjoyment.

[Reference was also made to Woodfall's Law of Landlord and Tenant, 25th ed., p. 680; *Matania* v. *National Provincial Bank Ltd.*[7]; *Aldin* v. *Latimer Clark, Muirhead & Co.*,[8] and *Jaeger* v. *Mansions Consolidated Ltd.*[9]]

T. L. Dewhurst for the tenant. In this case, the premises having been demised for use as a shop, the question whether there has been a breach of the landlords' covenant for quiet enjoyment is one of fact, which must be considered in the light of the purpose for which the premises were demised. There may be a breach of the covenant for quiet enjoyment by acts done outside the premises in the same way as a nuisance may be caused by acts on adjacent property: *Andreae* v. *Selfridge & Co. Ltd.*[10] The decision in *Leader* v. *Moody*[11] shows that what was done here was a breach of the covenant. The only qualification of the general principle laid down in *Sanderson* v. *Berwick-upon-Tweed Corporation*[12] as to what constitutes a breach of the covenant is stated by Parker J. in *Browne* v. *Flower*[13] to be that the disturbance must be direct and physical and something more than a mere temporary interference and more than an interference with privacy or comfort, which are rights not recognized by law. [*Robinson* v. *Kilvert*[14] was referred to.]

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[7] [1936] 2 All E.R. 633.

[8] [1894] 2 Ch. 437; 10 T.L.R. 452.

[9] (1903) 87 L.T. 690.

[10] [1938] Ch. 1.

[11] (1875) L.R. 20 Eq. 145.

[12] 13 Q.B.D. 547.

The landlords contend that the acts of which the tenant complains were reasonable and necessary and that that absolves them. That defence is not open to them where there is the relationship of landlord and tenant which is based on contract. A landlord cannot do any act, however beneficial it may be to himself, which substantially interferes with the tenant's rights under his lease. What amounts to a substantial interference is a question of fact. The county court judge's decision was not against the weight of the evidence and his finding should not be disturbed.

Stephen Chapman Q.C. in reply. In *Robinson* v. *Kilvert*[14] there the property in question had been rendered wholly unfit for the purpose for which it was let. That is not this case. The language of Fry L.J. in *Sanderson* v. *Berwick-upon-Tweed Corporation*[15] was approved in that case, but it must be read in the light of the facts there considered. The temporary nature of the interference with the demised premises by this scaffolding affords a complete answer to the tenant's claim.

LORD EVERSHED M.R. This was an action for damages for breach of a covenant for quiet enjoyment. By a lease dated October 13, 1955, the lessors demised to the lessee the ground floor lock-up shop, situate at and known as No. 16, Eden Street, Kingston-upon-Thames, for a term of 10 years at a rent of £700 per annum. The lessee entered into numerous covenants of the kind that one would expect in a lease of this character. The covenants included the following "and also will use and occupy "the said shop for the retailing of baby carriages radio sets and "radio accessories and toys and for no other purpose except with "the consent in writing of the lessors." Among the lessors' covenants was a covenant for quiet enjoyment in, no doubt, very usual form; but, having regard to the argument, it is desirable that I should read it: "And that the lessee paying the rent "hereby reserved and performing and observing the several "covenants conditions and agreements herein contained and on "his part to be performed and observed shall and may peaceably "and quietly hold and enjoy the said premises hereby demised

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[13] [1911] 1 Ch. 219, 228.

[14] (1889) 41 Ch.D. 88.

[15] 13 Q.B.D. 547.

"during the term hereby granted without any lawful interruption or disturbance from or by the lessors or any person or "persons claiming under them or either of them."

Three days after the grant of this lease the lessors, through certain contractors employed for the purpose, erected, immediately in front of the shop window and door, scaffold poles to carry out repairs which were undoubtedly needed, and indeed urgently needed, on the upper part of the same premises in Eden Street. These upper premises belonged to the lessors and were in the occupation of the lessors. Most unfortunately, the lessors omitted to warn the lessee of this impending operation or to inform him about it; and the dismay of the lessee in finding scaffold poles in front of his shop window was natural enough. What, unfortunately, aggravated the dismay of the lessee was that the week next following happened to be a week in which a very much more active retail trade was likely in the class of articles which the lessee was selling and had, indeed, covenanted to sell. In fairness to the lessors, however, it must be said that, when the view of the lessee was brought to their minds, they took all proper steps as good landlords to minimize the disarrangement (I am deliberately using a neutral word) of the lessee's affairs by arranging that the scaffold poles should be placed as conveniently as possible from the lessee's point of view and also by arranging that the work should be done at once and with great expedition. It was in fact completed in 11 days instead of taking, as had originally been expected, six weeks. The lessee nevertheless claimed that he had suffered through this vital week a serious and a substantial loss of his business as a shopkeeper, and that the presence of these scaffold poles, and perhaps the men working on the planks immediately above them, seriously interfered with the ordinary access of the public to the shop and to the shop window. It need not be emphasized that a lock-up shop, according to the ordinary significance of that term, means a place which will have a shop window and in that shop window the goods to be sold will be exhibited so as to attract custom.

In the circumstances the judge came to the conclusion that the erection of these scaffold poles in close proximity to the shop window constituted a breach of the covenant for quiet enjoyment, not being of so trifling or purely transitory a character as to disentitle the lessee from making any claim; but, though the judge heard evidence of lost trade, he was not satisfied that the lessee had proved in fact specific losses, and he therefore ended his judgment with these words: "I am entitled, although no "special damages have been proved, to award more than merely "contemptuous damages, and I propose therefore to award the "plaintiff the sum of 40s. by way of damages."

That being the result of the case, it seemed at first sight surprising that the lessors should desire this court to rehear the matter upon a claim for 40s.; but Mr. Chapman, for them, has stated that the ground of the decision, or the legal premise upon which it rested, was a matter of great importance to the lessors, whose business is that of surveyors and estate and house agents; and he intimated that according to his submission the decision would create something of a new departure in the law relating to covenants of this nature.

Let me say at once that, in my judgment, the duty and the sole duty of this court is to say whether the award of 40s., which the judge gave to the lessee, was justified having regard to the circumstances of this case and the facts as found by the judge and by the terms of the lease in question. The case being so confined, I am for my part satisfied that there is no ground shown for disturbing the judge's conclusion.

I think there are in truth, as Mr. Chapman submitted, two distinct questions in a case of this kind: first, one of law, what is the meaning and effect, so far as relevant, of the covenant, breach of which is alleged; and, second, on the facts, has the plaintiff proved that he has brought himself within the scope of the covenant as properly construed?

I begin by referring again briefly to the lease. It is a lease of a shop and I have referred to the necessary implications of that word. It is also to be noted that the demise was for a purpose expressly defined, namely, the retail sale of particular articles. Prima facie, that being so, it would appear that the language of the covenant would suffice to cover any act on the lessors' part which prevented the lessee from the enjoyment of the premises demised to him for the purposes for which they were so demised. But there is no doubt that covenants of this character have been the subject of many decisions, and the general conclusions to be drawn from them may from time to time give rise to difficulty. In Foa on The Law of Landlord and Tenant, 7th ed., p. 292, the following proposition is stated under the heading "Substantial interference with enjoyment": "The question whether the quiet enjoyment of the premises "demised has been interrupted or not is in every case one of "fact; and the covenant is broken although neither the title to "the land nor the possession of the land may be otherwise "affected, where the ordinary and lawful enjoyment is substantially interfered with by the acts of the lessor or of those "lawfully claiming under him." The second sentence is in fact a citation of the language of Fry L.J. in this court in *Sanderson* v. *Berwick-upon-Tweed Corporation*,[1] the judgment of the Lord Justice being the judgment of the court.

As to the first part of the passage which I have read (and it is taken from earlier editions of the same work which were written by the author himself) the first sentence, "The question "whether the quiet enjoyment has been interrupted or not is in "every case one of fact," seems to me, upon the present appeal, to reduce the scope of the debate considerably; for, having looked at the evidence and looked particularly at the photographs, it seems to me impossible to say that the judge was not well justified in concluding, as he did, that the interference here, the interruption of the quiet enjoyment, was, as a fact, substantial even though it did not last a very long time. That was, in all the circumstances of this particular case, the conclusion of fact at which the judge arrived; and Mr. Chapman has not indeed pressed us much upon that aspect of the matter.

There remains, however, the question whether the nature of the obstruction or interruption is of a kind incapable of constituting a breach of the covenant. If the passage which I have read from the judgment of Fry L.J. is correct, then it undoubtedly upon the face of it suffices to justify the legal premise on which the judge proceeded; and it is right to mention that the language of Fry L.J. was expressly referred to with approval in *Robinson* v. *Kilvert*[2] by Lindley L.J. But I think it may well be true also to say that some qualification should be placed upon the broad significance of the language of Fry L.J. for this reason, if for no other, that the language which he used was used in reference to the facts of the particular case then before the court. I am prepared to assume that the disturbance, the interruption, must at least be of what is called a direct and physical character. It was very early decided that an injunction granted at the suit of a superior landlord to prevent the carrying on of some business or the doing of some act by the sublessee cannot be treated as constituting a breach of covenant for quiet enjoyment; and there have been other cases where the matter complained of has been the emanation of fumes or the making of noises and other matters of a kind commonly forming the subject

[1] (1884) 13 Q.B.D. 547, 550, 551.

[2] (1889) 41 Ch.D. 88.

of actions for nuisance. But we are here concerned with something that is not only physical—the placing of scaffold poles, like hoardings, is certainly physical—but also direct; it was done at the direct requirement of the lessors. I take as correct the language of Parker J. in *Browne* v. *Flower*,[3] where he said: "It appears to me that to constitute a breach of such a covenant "there must be some physical interference with the enjoyment "of the demised premises, and that a mere interference with "the comfort of persons using the demised premises by the "creation of a personal annoyance such as might arise from "noise, invasion of privacy, or otherwise is not enough." If that passage be taken, as I am content to assume that it is, as correct, then it certainly does not, as I think, disable in any sense the basis upon which the judge in the present case decided in the plaintiff's favour.

It was said by Mr. Chapman that we must further qualify the language of Fry L.J. and that there could be no breach of the covenant for quiet enjoyment unless there was what he called an actual physical irruption into or upon the premises demised on the part of the landlords or some persons authorized by them by their actually entering upon or invading the premises, or by, e.g., the irruption thereon of water emitted from the landlords' premises elsewhere. In my judgment, that submission is not justified by the authorities. I do not think that there is any sufficient warrant for such a limitation upon the language of Fry L.J. Concluding, therefore, as I do, that in this case the judge was entitled to find as a fact that the interference was substantial and that there was no principle of law which disqualified him from concluding as he did, I think that this appeal must fail and should be dismissed.

BIRKETT L.J. I think that the judge in this case was entirely right, and, as my Lord has expressed all that I would wish to have said, I will content myself by saying that I agree with the judgment which has just been delivered, and have nothing further to add.

ROMER L.J. I also agree, and have very little to add. It has become quite well established by the authorities that no act of a lessor will constitute an actionable breach of a covenant for quiet enjoyment unless it involves some physical or direct interference with the enjoyment of demised premises. In regard to that, I think that Mr. Dewhurst was right when he said that, in considering whether the enjoyment of premises has been disturbed, one looks to see what the purposes were for which the premises were granted. In a case such as the present, where the premises were demised for the use of a retail shop, the question is whether there has been an interruption or disturbance by the lessor of the enjoyment of the premises in relation to that purpose.

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[3] [1911] 1 Ch. 219, 228.

The question whether or not there has been such a physical or direct interference with the enjoyment of the premises has been decided here by the judge on the facts in favour of the plaintiff. I am bound to say that I entirely agree with him. One has a very good picture of what was being done from the photographs, which show the scaffolding which was put up and that there was an interference with the access to the shop premises by anybody who desired to enter them.

Then comes the question whether the degree of interruption be such as to constitute a ground for legal complaint or whether it should be merely dismissed on the ground of its being of a temporary character or on the ground of de minimis. That appears to me to be essentially a question of fact to be determined by the judge who tries the action. The judge in this case, having reviewed all the circumstances which he considered relevant, including the fact that the period of time, these 11 days, during which the scaffolding was up preceded the autumn budget, came to the conclusion that it did involve an interference with access to the premises of a kind and degree which entitled the plaintiff to sustain his action. That is not a conclusion with which we should, even if we could, interfere; and there is ample evidence and material to support the conclusion at which the judge arrived. Therefore I do not think that we ought to disturb it. For my part, I cannot see that the judge's finding should be displaced by the considerations on which Mr. Chapman relied, which may be summarized in this way: that the work of external repair which the lessors put in hand was reasonably necessary, that it was efficiently done and was done with all reasonable speed. I do not think that those considerations are really relevant to the question of whether there has been a breach of the tenant's contractual rights under the covenant for quiet enjoyment, although they have obviously assumed importance in the minds of the lessors themselves. Accordingly, it appears to me that the judge has in no way misdirected himself on any point of law in the case, and has made findings of fact with which this court should not interfere, even if it took a different view, which for my part I do not; and accordingly the appeal must fail.

Appeal dismissed.

Solicitors: *George C. Carter & Co.; George E. Baker, Guildford.*

B. A. B.

REGINA *v.* BOARD OF CONTROL AND OTHERS. *Ex parte* RUTTY.

1956
Jan. 26;
Feb. 7, 21;
March 9.

Lord Goddard C.J., Hilbery and Devlin JJ.

Mental Deficiency—Detention order—Persons subject to—Mental defective living in poor law institution—Not receiving special treatment—Removed to mental institution on the ground of being "found "neglected"—"Abandoned"—"Cruelly treated"—Meaning—Mental Deficiency Act, 1913 (3 *&* 4 *Geo.* 5, *c.* 28), *s.* 2 (1) (*b*) (i).

Habeas Corpus—Jurisdiction of inferior court to order detention—Power of superior court—Return to writ ordered—Court's power to examine truth of facts set out in return—Power to inquire whether there was evidence on which magistrate could make reception order—Mental defective—Reception order—Habeas Corpus Act, 1816 (56 *Geo.* 3, *c.* 100), *ss.* 3, 4.

The applicant, a borderline high grade mental defective, was brought up in a poor law institution. After leaving school she worked there, where she was provided for but was given no special training. Once she attained the age of 17 there was no power to detain her and as it was feared that she was about to depart she was removed to a mental institution under "a place of safety" order made on the ground that she was "found neglected." Subsequently a petition was presented by the supervising officer of the county council to a magistrate acting as the judicial authority under the Mental Deficiency Acts, 1913 to 1927, asking for a reception order so that she could be detained in an institution for defectives. The magistrate found that the applicant was a defective within the meaning of the Acts, being a feeble-minded person, and that she was subject to be dealt with under the Acts by reason of her being "found neglected," and he accordingly made a detention order. The applicant applied for a writ of habeas corpus alleging that the order was ultra vires the Act of 1913 because at the time when the order was made she was not a person subject to the Act who could be dealt with on such a petition:—

Held, (1) that the court had power to admit affidavit evidence to decide whether there was any evidence before the magistrate to justify his finding that he had jurisdiction to make the order.

Rex v. *Judge Radcliffe. Ex parte Oxfordshire County Council* [1915] 3 K.B. 418; 31 T.L.R. 610 applied.

(2) That the words "found neglected" in their context in section 2 (1) (*b*) (i) of the Act of 1913[1] strongly suggested that the defective had to be found through neglect in some degree of distress. Although the words connoted sins of omission rather than commission, they had at least to be construed as meaning physically suffering a lack of essentials through want of reasonable care, and they were only applicable to a condition in existence and were not apt to refer to a future condition which it was apprehended would or might come about; accordingly, there was no evidence before the magistrate on which he could properly decide that the applicant was "found neglected"; and, therefore, in the circumstances of the present case, he had no power to make the order.

Per Lord Goddard C.J. and Devlin J. The duty of a judicial authority in deciding whether a person was a mental defective was not only to have two medical certificates before him, but to hold an inquiry, see the alleged defective, and apply such tests and call such evidence as he might require.

Per curiam: "Abandoned" in section 2 (1) (*b*) (i) of the Act of 1913 connoted a positive act on the part of someone responsible for the defective whereby that person had relinquished all care and control and forsaken the defective thus leaving the defective wholly unprovided for and unprotected. It envisaged as did the words "cruelly treated" a physical condition brought about by positive and wrongful acts done to the defective which could properly be said to require the intervention of the authority by the exercise of the powers given to it by the Act.

APPLICATION for habeas corpus.

The applicant, Kathleen Rutty, was born on May 10, 1931. At the age of three months she was taken from her mother and put in a poor law institution at Braintree, Essex, which later became known as St. Michael's Hospital. At the age of three she was transferred to Friars Home, Bocking, Braintree, where she lived until she was 15 years old. From the age of five until 15 she attended ordinary schools for normal girls and no one suggested that she was mentally defective. When she left school the applicant was sent to work at St. Michael's Hospital as a resident domestic worker, where she received a wage in addition to board and lodging. On June 21, 1948, while still in the care of the county council and living and working at St. Michael's under their directions, the applicant was detained by officers of the Royal Eastern Counties Institution, Colchester, a mental institution, and taken into custody there under a "place of "safety" order made in accordance with the provisions of section 15 (1) of the Mental Deficiency Act, 1913, on the ground that she was found "neglected, abandoned, or without visible "means of support or cruelly treated." By her affidavit the applicant alleged that any assertion that she was found neglected, abandoned or cruelly treated was a complete pretence because she was found at St. Michael's Hospital in the custody and under the care of the county council, going about her duties quite normally. Moreover, any assertion that she was found without visible means of support was similarly wrong because on June 21, 1948, she possessed £15 in her Post Office savings account as well as four national savings certificates. The applicant was kept in custody at the institution until December 9, 1948. On that day she was taken before a magistrate, duly appointed and acting as the judicial authority under the Mental Deficiency Acts, 1913 to 1927, on a petition presented by the supervising officer of the Essex County Council, alleging that the applicant was a mental defective subject to be dealt with under the Acts and asking for a reception order to be made, and that she should be ordered to be detained in an institution for defectives. The magistrate found that the applicant was a defective within the meaning of the Acts, being a feeble-minded person, and that she was subject to be dealt with under the Acts by reason of her being found neglected. He ordered that the applicant should be detained at the institution. From June 21, 1948, for about three and a half years, the applicant alleged that she was kept at work in the institution, first on domestic work and later operating electrically driven looms weaving cloth. In about 1952 she was allowed to work on a day licence. Subsequently she was sent to work on a residential licence to an aunt, then to a private nursing home as a domestic worker, and after a year there was transferred to a hospital at Colchester. Finally, on October 11, 1955, she was sent on a residential licence to her half-brother. The licence provided, inter alia, that the applicant was to be returned to the institution upon a written request by the medical superintendent, that special precautions should be taken to prevent the formation of attachments with members of the opposite sex, and that she should not be allowed out alone, but only with some responsible grown up (woman).

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[1] Mental Deficiency Act, 1913, as amended by the Mental Deficiency Act, 1927, s. 1: "(1) The following "classes of persons who are mentally "defective shall be deemed to be "defectives within the meaning of "this Act:—. . . (*c*) Feeble-minded "persons, that is to say, persons in "whose case there exists mental "defectiveness which, though not "amounting to imbecility, is yet so "pronounced that they require care, "supervision and control for their "own protection or for the protection "of others . . . (2) For the purposes "of this section, 'mental defective-"'ness' means a condition of arrested "or incomplete development of mind "existing before the age of 18 years, ". . ."

S. 2: "(1) A person who is a defec-"tive may be dealt with under this "Act by being sent to or placed in "an institution for defectives or "placed under guardianship:—(*a*) at "the instance of his parent or "guardian, if he is an idiot or "imbecile, or at the instance of his "parent if, though not an idiot or "imbecile, he is under the age of 21; "or (*b*) if in addition to being a "defective he is a person—(i) who "is found neglected, abandoned, or "without visible means of support, "or cruelly treated, or with respect "to whom a representation has been "made to the local authority by his "parent or guardian that he is in "need of care or training which can-"not be provided in his home; . . ."

The applicant applied for a writ of habeas corpus to issue directed to the medical superintendent of the Royal Eastern Counties Institution, Colchester, the Board of Control and her half-brother, alleging that the reception order of December 9, 1948, was ultra vires the Act of 1913, inasmuch as she was not a person subject to the Act who could be dealt with on such a petition, and that there was not, on the facts of her case, any evidence before the magistrate on which he could properly find that she was a person subject to be dealt with under the Act on such a petition and that, therefore, her continued detention was illegal. The applicant also alleged that she was not a mental defective.

Affidavits filed on behalf of the respondents included one by the matron of St. Michael's Hospital, in which she stated that the applicant while employed at the hospital was entirely unsatisfactory, being lazy, inefficient and difficult to control. On February 27, 1948, her services as a domestic servant were terminated and she became an inmate of the institution. The matron formed the opinion that the applicant was subnormal and in need of care and supervision.

The supervising officer of the Essex County Council in his affidavit stated that the applicant was examined by two doctors, both of whom reported that she was a high grade mental defective. As it was feared that the applicant might discharge herself from the hospital, and since there was no power to detain her there after she reached the age of 17 years, the applicant on June 21, 1948, was removed to the Royal Eastern Counties Institution under a "place of safety" order. The supervising officer saw the applicant on November 5, with another doctor, and completed the necessary documents required by section 5 of the Act of 1913 in order to present a petition under the Acts for a reception order, which petition was heard and the reception order made on December 9, 1948.

The affidavit of Dr. Ralph Marshall Bates, the physician superintendent of the Royal Eastern Counties Institution, stated that the applicant was brought to the institution on June 21, 1948, by an authorized officer of the Essex County Council, and was placed under his care and control pursuant to section 15 of the Act of 1913, and remained a patient in the institution until December 9, 1948, when she was discharged in order to be brought before a judicial authority with a view to a reception order being made under section 6 of the Act. Following the making of the order she was readmitted to the institution under the order. After a period of stabilization and training Dr. Bates considered the applicant to be a suitable person to be tried on leave of absence on licence, and she was accordingly given licence to reside in various places as set out above.

On February 7, 1956, after considering the affidavits filed on behalf of the applicant and the respondents, the court ordered the writ of habeas corpus to issue.

The return to the writ was made by the Board of Control and Dr. Bates, who returned that the applicant was detained in the custody of Dr. Bates "by virtue of a reception order dated "December 9, 1948," a copy of which was annexed to the return which set out the ground for making the order and was on its face a valid order for the detention.

By an affidavit made subsequent to the order that the writ should issue, Christopher John Jolly, a magistrate and judicial authority under the Mental Deficiency Acts, stated that, having found the applicant was a defective within the meaning of the Acts, being a feeble-minded person and subject to be dealt with under the Act of 1913 by reason of her being found neglected, he made an order ordering the applicant to be sent to the Royal Eastern Counties Institution. Owing to the length of time which had elapsed, he was unable to recollect what information was placed before him at the hearing of the petition on which the order was founded, and all papers relating to mental deficiency matters prior to 1950 had been destroyed. He had no reason to believe that when he made the order he did not follow the proper and normal procedure on hearing petitions under the Acts. Normally he would consider the petition and documents required by section 5 of the Act of 1913 to be attached to it, and the petitioning officer would give him the facts on which it was represented that the alleged defective was liable to be dealt with, together with other relevant matters concerning the family of the alleged defective, his home conditions and educational attainments. If a parent or guardian appeared at the hearing of the petition he would afford such person full opportunity of making any representation the parent might wish to make. He would also examine the alleged defective as to his mental condition.

On February 21, 1956, on a motion by the applicant to contravert the terms of the return, the court ordered the applicant to be released.

Feb. 7. *John Platts-Mills* for the applicant. The reception order was made without jurisdiction because there was no evidence before the magistrate that the applicant was a mental defective. Even if she were, the Mental Deficiency Act, 1913, does not automatically give power to make the order. It is necessary, under the circumstances existing in the present case, that one of the conditions specified in section 2 (1) (*b*) (i) of the Act should exist. The order was made on the ground that the applicant was "found neglected," but there was no evidence of that; on the contrary, at the material date the applicant was at the poor law institution in the care and control of the county council.

[Devlin J. A strong probability that a person will become neglected is not the same as being "found neglected," which is the necessary requirement under the Act.]

There is no direct evidence as to what the applicant would have done if she had walked out of the institution. [Reference was made to *Rex* v. *Judge Radcliffe. Ex parte Oxfordshire County Council.*[2]]

Mrs. E. Underhill for the applicant's half-brother.

Rodger Winn for the Board of Control and Dr. Bates, the medical superintendent. This case raises a very important point. What does "found neglected" mean in the Act of 1913 and do the facts found constitute that? In June, 1948, when the applicant was in the poor law institution she was technically neglected; she could not be trusted to work in any domestic capacity, and the management committee of that institution thought that it was not a suitable place in which training could develop the applicant's faculties. Accordingly, it was permissible under the statute to make an order that the applicant was "found neglected." It would be disastrous if a more narrow interpretation were to be put on the Act so that a mental defective in a poor law institution would have to be turned out in order that she could be found neglected before she could be sent to a mental institution where she could receive the necessary training. The applicant could not have been kept on at the mental institution without an order being made because she was only taken there as a place of safety, when it was feared she would leave the poor law institution, until the petition could be presented.

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[2] [1915] 3 K.B. 418; 31 T.L.R. 610.

The Act and section have been considered only in *Judge Radcliffe's* case [3] and *In re Wilkinson.*[4] In the judgment of Lush J. (delivering the judgment of the court) in *Radcliffe's* case [5] there is a recognition of the mischief at which the Act is aimed. In any event the proceedings are not correctly brought; they should be for an order of certiorari to quash the order of the judicial authority. If a return were ordered to the writ of habeas corpus it would set out the order of the judicial authority which justified the Board of Control and the medical superintendent in all that they have done.

Although section 3 of the Habeas Corpus Act, 1816, provides that it is lawful for a judge to examine into the truth of the matters set out in a return to the writ, the only matter which the court could inquire into, if a return were ordered in the present case, would be whether the order relied on was made by the judicial authority in respect of the applicant. Whether the judicial authority had evidence before him on which the order could be made would not be a matter into which the court should inquire. If the applicant is right, then no mental defective can be dealt with under the Act any longer, because every mental defective has a right to go to a poor law institution and be looked after there, and therefore could not be found neglected, abandoned, without visible means of support, or cruelly treated, which are the conditions necessary for making an order under section 2 (1) (*b*) (i) of the Act.

[LORD GODDARD C.J. The court orders a return to the writ of habeas corpus to be made within 14 days; we also give leave to move for an order of certiorari if that is found to be necessary.]

Feb. 21. *John Platts-Mills* on a motion to contravert the terms of the return. The order of December 9, 1948, set out in the return, is made on the ground that the applicant was "found "neglected"; the magistrate relied on a statutory declaration of November 5, 1948, to that effect. On that date she was actually in the mental institution. The order was made on December 9, on which day she was discharged so that the order could be made. But the statutory declaration made five weeks previously did not even have the support of that notional discharge.

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[3] [1915] 3 K.B. 418.
[4] (1919) 83 J.P. 422.
[5] [1915] 3 K.B. 418, 424.

[LORD GODDARD C.J. The statutory declaration is not conclusive of the facts stated therein, but is only the ground on which the applicant is brought before the judicial authority.]

The order was not made in accordance with the evidence. The statutory declaration alone is not sufficient evidence on which the judicial authority can make the order. The declaration itself gave him grounds for inquiry, as to whether the applicant was really "found neglected," because it stated that she was residing in the mental institution.

On the question whether habeas corpus or certiorari is the correct procedure, as a matter of law, certiorari is not available because the making of the order by the judicial authority has been held to be a purely administrative act: *Newman* v. *Foster.*[6] That means that this court will be all the more willing to entertain an application for habeas corpus.

[LORD GODDARD C.J. *Judge Radcliffe's* case [7] appears to be in favour of the applicant's contentions. Are the respondents trying to distinguish it?]

Rodger Winn for the respondents. *Judge Radcliffe's* case [7] can be distinguished on the ground that it is a decision on "without visible means of support" and not on "found neglected."

[DEVLIN J. Can you distinguish it on the ground of the principle stated by Lush J.[8] that the court had to decide whether the judicial authority had sufficient and proper material before it on which it could act?]

It is not for the court to decide whether the judicial authority came to a right decision on the facts. If it is apparent, however, that all that was before the authority was in law nugatory for the purpose of finding that the applicant was neglected, then the court could hold that there was no power to make the order. The real question is whether there was neglect in law, on the true construction of section 2.

If all that was before the judicial authority could not in sum amount to neglect, then he had no power to make the order. The whole case stands or falls on this proposition: care and attention which a mental defective requires is care and attention of a kind different from that required by a normal human being. Where such care and provision of necessities as would be appropriate for a normal adult are being provided for a mental defective, that mental defective would be neglected.

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[6] (1917) 86 L.J.K.B. 360.

[7] [1915] 3 K.B. 418.

[8] Ibid. 421.

[LORD GODDARD C.J. If a well-to-do family treated a mentally defective child in the same way as their normal children, would that child be neglected?]

Yes. After the applicant reached the age of 17 in May, 1948, she could not be treated as a child, but remained in the poor law institution as an ordinary adult and was entitled to leave whenever she wished. She was not entitled to receive any training but only the bare relief that any poor person received in such an institution, namely, food, clothing and a bed in which to sleep. She was therefore being neglected because she was not receiving the appropriate training or care necessary for a mental defective, and there was no statutory provision for any person to discharge any function in relation to her or provide training, care or moral supervision. She needed the care, supervision and training which she has since received and which have enabled her now to be able to earn her own living.

The material date for considering whether the applicant was found neglected was June 21, 1948, when she was removed from the poor law institution to the mental institution under a place of safety order which was intended to deal with an emergency.

[DEVLIN J. Although a person may be physically looked after and morally supervised, although not educated and trained, would you say there was neglect?]

Yes, qua a mental defective.

[DEVLIN J. If a mentally defective girl is residing with her aunt, can some person visit the home, find the child very well looked after, but as there is no opportunity for training the child there, truthfully make a statutory declaration that the child is "found neglected" so that she can be taken away?]

There is no power to enter a home and arrest or seize a defective. The main and primary function of the statute is to enable a defective, where there is real and obvious neglect, to be taken to an institution, but it does not mean that if there is only technical neglect that there is no power to send the defective to an institution. A child cannot be taken away from its home without the consent of its parent or guardian: section 6 (3) (*a*). These powers in the Act are meant to be, and have since 1913 been, exercised with a full sense of responsibility.

[LORD GODDARD C.J. I cannot see how you get away from the mental defective child living with well-to-do relations, but not receiving proper training. Frankly it shocks me that such a child could be considered "neglected." It would put a wholly undesirable power into the hands of the local authority.]

If a strict interpretation is to be given to the word "neglected," then it would be impossible for anyone to be "found neglected" at the present time. Everyone in this country is entitled to medical care and national assistance; no one can starve and a person only has to put himself in touch with the proper authority in this welfare State to be provided with the necessities of life.

[LORD GODDARD C.J. We cannot interpret the Act differently because conditions have changed since 1913.]

The applicant's contention that the judicial authority in making a reception order is acting merely in an administrative capacity is not accepted and is based on a misconception of *Newman* v. *Foster*,[9] which was dealing with quite a different matter, namely, the fixing of contributions under section 13 of the Act. *Hodson* v. *Pare* [10] makes it clear that the making of an order is a judicial act. For future purposes the proper test is whether there is any evidence before the judicial authority which could in law constitute neglect. It would not be right for the court to review the sufficiency of the material.

V. G. Hines, for the judicial authority, was not called on to argue.

Cur. adv. vult.

March 9. LORD GODDARD C.J. I will ask Hilbery J. to read the first judgment.

HILBERY J. stated the facts and continued: It is important in the first place to observe that the Mental Deficiency Act, 1913, does not empower the authorities designated by the Act to obtain reception orders resulting in detention and deprivation of liberty in the case of all mental defectives however circumstanced. Only such mental defectives as come within the classes defined by the Act can be dealt with in the exercise of the powers given by the Act. It is necessary, therefore, to see who are the persons who can be dealt with under the Act and made subject to an order on such a petition.

Section 2 (1) provides that a person who is a defective "may "be dealt with under this Act by being sent to or placed in an "institution for defectives or placed under guardianship—. . . "(*b*) if in addition to being a defective person he is a person— "(i) who is found neglected, abandoned, or without visible means "of support, or cruelly treated . . ."

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[9] 86 L.J.K.B. 360.

[10] [1899] 1 Q.B. 455; 15 T.L.R. 171.

The magistrate based his decision on the question whether the applicant was subject to be dealt with under the Act as a defective on a finding by him that she was a person "found "neglected." If there was no evidence upon which he could properly so find there was no power to order her detention however mentally defective she might be. Whether there was such evidence depended in this case on whether on the facts of her case it could be adjudged that the applicant had been "found "neglected" within the meaning of those words as used in the Act and properly construed. Unless on the correct interpretation of those words "found neglected" as they are used in the statute the applicant could be held, on the evidence before the magistrate, to be a person "found neglected," she was not amenable to the jurisdiction conferred by the Act although she might be a mental defective.

On an application for a writ of habeas corpus this court does not sit as a court of appeal. It will not re-hear the matters which were to be decided by the judicial authority. The court will, however, admit affidavit evidence to decide whether there was any evidence before the judicial authority such as would justify his finding that he had jurisdiction to deal with the patient and to make an order.

In *In re Bailey*,[1] where the return to a writ of habeas corpus was that the detention of the applicant was upon a conviction and warrant for an offence against the statute 4 Geo. 4, c. 34, namely, that the prisoner being employed on a contract of service had unlawfully absented himself from that service contrary to the statute, the court held that affidavit evidence was admissible to show that there was not evidence before the justice on which the justice could properly decide that there was such a contract of service, since if there was no contract of service the justice had no jurisdiction.

In *In re Baker*,[2] where there had been a second conviction for absenting himself when under a contract of service, it was held by Pollock C.B. and Watson B. that affidavits might be used for the purpose of showing that the absenting in respect of which a second conviction took place was the not returning to the service after the expiration of the imprisonment under the first conviction, for in that case the justice had no jurisdiction.

In *In re Authers*,[3] where the return showed that the prisoner had been convicted and was imprisoned as for a second offence under section 3 of the Licensing Act, 1872, affidavit evidence was apparently admitted to show that the first conviction taken into consideration by the justice had been a conviction under an earlier and different statute and could not therefore be taken into account by the justice as entitling him to treat the conviction before him under the Licensing Act as a second conviction. The court held[4] that it could receive affidavits to show that the magistrate had "found a previous conviction when, in point of "fact, there was none."

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[1] (1854) 3 El. & Bl. 607.

[2] (1857) 2 H. & N. 219.

[3] (1889) 22 Q.B.D. 345; 5 T.L.R. 216.

Lastly, in *Rex* v. *Judge Radcliffe. Ex parte Oxfordshire County Council*[5] which, it is true, was an application for a writ of certiorari to quash two orders made by the county court judge acting as the judicial authority under the Mental Deficiency Act, 1913, affidavits were admitted to show that there were no proper grounds for making the orders admissible by the statute. One of the orders in question was a reception order made on the ground that the subject had no means of her own and was incapable of earning her own living and was not legally maintainable in their home by her parents, and was without visible means of support within subsection (1) (*b*) (i) of section 2 of the Act. The court in terms there stated[6] that on the application before it the court had to see "whether the learned county "court judge had any sufficient and proper materials before him "to justify him in making these orders and whether in making "them he acted on proper grounds contemplated by the statute" and held that he had not.

We therefore examined the return in the light of the affidavits to ascertain whether it was true that the applicant was a mental defective who was amenable to the procedure by way of petition under the Act of 1913. That inquiry involves the question whether, on a proper construction of the Act, there was any evidence on which the judicial authority could properly, that is as a matter of law, find that she was a person "found neglected" who could therefore be made the subject of the order which was made.

The magistrate who heard the petition on December 9, 1948, by his affidavit says that he decided that the applicant was a person subject to be dealt with under the Act by reason of her being "found neglected." He had before him an affidavit by the petitioning officer of the Essex County Council that the applicant, the alleged defective, was subject to be dealt with under the Acts, that is to say, the Mental Deficiency Acts, 1913 to 1927, because she was "found neglected."

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[4] 22 Q.B.D. 345, 350.

[5] [1915] 3 K.B. 418.

[6] Ibid. 421.

Such an affidavit in support of the petition was necessary under section 5 of the Act of 1913. By itself that statement by the petitioning officer is no more than an assertion that the subject of the petition was in fact "found neglected." The inquiry by the judicial authority was a judicial inquiry and involved the duty to decide whether the circumstances of the person who was the subject of the petition were such that on a proper construction of the words in the statute she ought to be found to come within them.

The magistrate, indeed, informs us that normally he would consider the petition and the documents required by section 5 of the Act of 1913 and the petitioning officer would give him the facts upon which it was represented that the alleged defective was a person liable to be dealt with under the Act, together with other relevant matters concerning the family of the alleged defective, her home conditions and educational attainments.

It was in June, 1948, that the petitioning officer had caused the applicant to be removed from the poor law institution where she was to a place of safety on the ground that she was at that date "found neglected."

The fair and reasonable inference is, therefore, that the magistrate did not decide that the applicant was subject to be dealt with under the Act as a defective "found neglected" on the mere statement in the affidavit supporting the petition, but in addition had before him the facts concerning the applicant on which the petitioning officer alleged that this applicant was "found neglected" in June of 1948.

The relevant facts as they existed in June can be summarized as follows: When three months old the applicant had been placed by her mother in a poor law institution in Essex. She had been cared for and brought up by the poor law authorities. She had been sent to ordinary schools. After leaving school at the age of 15 she had been employed in various ways but had not given satisfaction. By June, 1948, she was 17 years of age and there was no power to detain her in the poor law institution. She had £19 saved from her wages including national savings certificates and a sum standing to her credit in the Post Office Savings Bank.

As an inmate of the poor law institution brought up from childhood by the poor law authorities, she had been clothed, fed and housed and, in addition, sent to school. She was still an inmate in the institution, but it was feared that she was about to remove herself from the institution. There was evidence that she was a borderline high grade mental defective.

Mr. Winn argued that although in June those were the circumstances she could then properly be said to be "found "neglected" because there was evidence that she was a mental defective and as such she required the special care appropriate for a mental defective, and being in an institution that could provide no more than the primary wants of an ordinary human being, such as food, clothing and shelter, she was rightly to be regarded as "found neglected." Mr. Winn further argued that if a mental defective is not being provided with the special care and special education which such a defective can and will receive if a reception order is made, that defective is neglected within the meaning of the Act and that that interpretation has been put upon the Act in a large number of cases.

I am quite unable to agree with this interpretation of the words "found neglected" in the context in which they are used in the Act. The Act is not designed to give power to local authorities to take under their control all mental defectives. The powers given are carefully limited by the Act and are only exercisable over persons coming within one or other of the categories enumerated in section 2 of the Act of 1913. The sidenote of that section reads "Circumstances rendering defec-"tives subject to be dealt with." The words in section 2 "found "neglected" are followed by the words "abandoned, or without "visible means of support, or cruelly treated." In that context they strongly suggest that the defective must be found through neglect in some degree of distress, such that a reasonable and humane authority having power under the Act ought to exercise the powers given by the Act and remove such a person to a place of safety and cause a petition to be presented.

"Abandoned" is a word which connotes a positive act on the part of someone who is responsible for the defective whereby that person has relinquished all care and control and forsaken the defective, thus leaving the defective wholly unprovided for and unprotected. It envisages, as do the words "cruelly "treated," a physical condition brought about by positive and wrongful acts done to the defective which could properly be said to require the intervention of the authority by the exercise of the powers given to it by the Act.

True, the expression "found neglected" connotes a sin or sins of omission rather than of commission, but when one finds that the expression "found neglected" is used and coupled with these two expressions "abandoned" and "cruelly treated" to describe the only circumstances which will render a defective person subject to be dealt with under the Act, the word "neglected" must at least be construed as meaning physically suffering from a lack of essentials through want of reasonable care.

Whether this construction which I have put upon the words "found neglected" as used in the Act is correct or not, Mr. Winn's contention appears to me to be answered by the fact that by section 2 of the Mental Deficiency Act, 1927, an amendment was specially made to section 2 of the Act of 1913 whereby it was enacted that there should be inserted in paragraph (*b*) (i) of section 2 (1) of the Act of 1913, after the word "treated" the words "or with respect to whom a "representation has been made to the local authority by his "parent or guardian that he is in need of care or training which "cannot be provided in his home." There, in express terms, Parliament has contemplated and dealt with the situation of a mental defective whose need is training which cannot be provided in his home. The local authority is not empowered to act because a mental defective needs care and training. In such a case it is only if the parent or guardian of the defective has made a representation to the authority that the authority can act. It would be strange indeed that Parliament should think it necessary to make this amendment if the local authority was already empowered by the words "found neglected" to deal with any mental defective who could not be provided in his home with the care and training needed by a defective.

Furthermore, the words "found neglected" can only be intended to be applicable to a condition which is in existence. They are not apt to refer to a future condition which it is apprehended will or may come about.

For these reasons I am of opinion that there was no evidence before the judicial authority who made the reception order for the detention of the applicant on which that authority could properly decide that the applicant was a mental defective "found "neglected."

The applicant was, therefore, not one in respect of whom the powers given by the Act could be exercised and we accordingly ordered her to be discharged.

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v.
BOARD OF
CONTROL.
Ex parte
RUTTY.

LORD GODDARD C.J., reading his judgment. I entirely agree with the judgment prepared and delivered by Hilbery J., and desire to add very little.

That this court has power to examine into the truth of the facts set forth in the return to a writ of habeas corpus and to examine them by means of affidavit evidence is clear from sections 3 and 4 of the Habeas Corpus Act, 1816. That Act effected a notable change in the law. Previously neither at common law nor by the Habeas Corpus Act, 1679, could the court do more than look at the return and decide whether on its face it showed a lawful cause of detention. The facts could only be controverted by an action for a false return. The reason for this is made clear by the opinion of Wilmot C.J.[7] delivered before the House of Lords in 1758, which will be found in the volume in which the opinions of that great and most learned judge are collected entitled Wilmot's Notes of Opinions. It was because questions of fact were involved and it was only a jury that could decide them. If, on inquiry, the court finds there was no evidence by which the order or conviction can be sustained, they can release on habeas corpus or quash on certiorari. This is clear from the cases cited by Hilbery J. But if there is evidence, whatever this court may think of it and no matter what conclusion the members of the court might have come to if they had been deciding the case which led to the conviction or order, they cannot disturb the finding, for so to do would be to act as a court of appeal in a matter in which no appeal is given. It is for this reason that it is so important to stress the duty of the judicial authority, especially in deciding whether the person brought before him is a mental defective. It is not enough that he should have two medical certificates. That they should have been given is a necessary preliminary to his having jurisdiction. But they are not conclusive in any shape or form. Had it been so intended the statute would have so provided and enabled the judicial authority to act merely by reading the certificates. Section 6 of the Act of 1913 makes it perfectly clear that there is to be a judicial inquiry and that the authority is in any case obliged to see the person concerned. In many cases, no doubt, the appearance and demeanour of the patient, to use a convenient word, would, coupled with the certificates, be enough, but I cannot believe it would ever be sufficient in the case of one who nowadays is described as a borderline high grade mental defective, whatever that may mean. These people, I gather, are those whom no one except psychiatrists would recognize as mentally defective, and that there is room for a difference of opinion among the latter is shown by the affidavits in this case. There are plenty of idle, naughty and mischievous children and young persons who are not mental defectives within the Act. It is for the judicial authority to apply such tests and to call for such evidence as he may require, and I hope this is generally done. But it is of the first importance that the magistrate should not think that on the question as to whether the patient is a mental defective he is merely to act as a rubber stamp, to use a convenient colloquialism. The affidavits in this case lead me to think that the magistrate did have evidence before him and that he must have made some inquiry, and I see no ground on which we could say that there was no evidence to support his finding as to mental deficiency.

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[7] Wilmot's Notes of Opinions, p. 77 et seq.

On the other point, I entirely agree that there was no evidence to support the finding that the patient was found neglected within the meaning of the Act. This is clear from the context in which the words "found neglected" appear. To give it the meaning contended for by the respondent would mean that a child living in a good, perhaps luxurious home, to whom every attention and loving care is being given could be taken against the will of its parents and confined in an institution because some doctors think that some form of treatment might be beneficial, and the parents would be placed under the stigma of having neglected their child. While, no doubt, what was done in this case was thought and intended to be for the benefit of the girl, persons of whatever age are not to be deprived of their liberty and confined in institutions merely because doctors and officials think it would be good for them.

DEVLIN J. Mr. Winn in this case conceded that the principle which was laid down in *Rex* v. *Judge Radcliffe. Ex parte Oxfordshire County Council,*[8] which principle Hilbery J. has already quoted, was the one that applied to this case, and accordingly the only matter which it is necessary for the court to determine is the meaning of "found neglected" in section 2 of the Act. On that point, I entirely agree with the reasoning that has been

[8] [1915] 3 K.B. 418.

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given by Hilbery J. and I need add nothing to it. I wish, however, also to say that I entirely agree with what Lord Goddard C.J. has just said about the duties of judicial authorities. I should like to point out that it is not enough under section 1 that a person should be found to be a mental defective. That is only the first of the two stages in the inquiry that has to be made under section 1, quite apart from section 2 which we have been investigating in this case. For the purposes of section 1, "mental defectiveness" means "a condition of arrested or "incomplete development of mind existing before the age of "eighteen years . . ." That is the first thing the judicial authority has to find, and no doubt on that the opinions of experts may be valuable to him. But, having found that, he must then go on to consider whether the mental defective falls within one of the four categories, in this case the category of the feeble-minded, and for that purpose the Act requires that the mental defectiveness should be so pronounced "that they"—that is, the mental defectives—"require care, supervision and control for their own "protection or for the protection of others." Although, of course, on that matter too the medical evidence may be of assistance, it seems to me to be peculiarly a matter on which the judicial authority, having made all the inquiries he thinks necessary in the best interests of the mental defective, should form his own view about his or her probable behaviour in the future and arrive at his own determination accordingly.

Application allowed with costs against the Board of Control and the medical superintendent.

Solicitors: *Robert K. George; Solicitor, Ministry of Health; W. J. Piper, Chelmsford.*

C. J. E.

TRESEDER-GRIFFIN AND ANOTHER v. CO-OPERATIVE INSURANCE SOCIETY LTD.

1955
Dec. 1, 6.

Lord Goddard C.J.

[1954 T. No. 1009.]

C. A.

1956
Feb. 20, 21;
Mar. 20.

Denning and Morris L.JJ.; Harman J.

Landlord and Tenant — Rent — Gold clause — Lessee to pay stipulated rent "either in gold sterling or Bank of England notes to the "equivalent value in gold sterling"—Whether words define measure of lessee's obligation or mode of discharge—Meaning of "gold "sterling"—Whether "value" means nominal currency value or intrinsic gold content value of gold coins of sterling currency—Whether clause contrary to public policy—Coinage Act, 1870 (33 *&* 34 *Vict. c.* 10), *s.* 6.

Gold Clause—Whether lawful in domestic contract.

A lease dated December 30, 1938, under which two shops were demised to the then lessees for 99 years from June 24, 1930, provided in the reddendum clause for the payment by the lessee "yearly "during the said term either in gold sterling or Bank of England "notes to the equivalent value in gold sterling the rent of £1,900 ". . . by equal quarterly payments. . . ."

In 1953 the lease was assigned to the present defendants, and later the lessors sued them for five quarters' rent based on the value in sterling of 475 gold sovereigns on each quarter day and sought a declaration that they were entitled thereafter to receive 475 gold sovereigns or their value in bank notes on the due dates.

Lord Goddard C.J. held that the clause was a "gold clause" to be construed in accordance with the House of Lords' decisions on gold clauses, and granted a declaration that the lessors were entitled to receive each quarter 475 gold sovereigns or, alternatively, such sum in Bank of England notes as represented the value of 475 gold coins of Great Britain of the standard weight and fineness in sterling in London at the date on which payment was due. On appeal by the lessees:—

Held (Harman J. dissenting), that under this clause in this domestic contract the lessees' obligation was to pay £1,900 yearly by equal quarterly payments, the words "either in gold sterling or "in Bank of England notes to the equivalent value in gold sterling" merely defining alternative modes of paying that amount. "Gold "sterling" meant gold coins of sterling currency; and as payment in gold coins was in 1938 impracticable and in 1953 illegal, the term could be complied with by payment of £1,900 in bank notes of the nominal or currency value of £1,900 in gold coins, which was £1,900 and no more. "Value" in this context meant neither the intrinsic value of the gold content of gold coins—the fluctuating bullion value—nor the fluctuating and temporarily higher market value of gold coins treated as a commodity.

Per Denning L.J. A man who stipulates for a pound must take a pound when payment is made, whatever the pound is worth at

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TRESEDER-GRIFFIN *v.* CO-OPERATIVE INSURANCE SOCIETY LTD.

that time. Section 6 of the Coinage Act, 1870,[1] makes it unlawful for a creditor to stipulate for payment of a money debt in any way other than in lawful currency.

Feist v. *Société Intercommunale Belge d'Electricité* [1934] A.C. 161; 50 T.L.R. 143 and *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.* [1939] A.C. 1; 55 T.L.R. 260; [1938] 4 All E.R. 747 distinguished.

Per Harman J. Though the word "value" in this domestic document cannot mean the price that would have to be paid to purchase sovereigns from an authorized dealer, since such value arises from extraneous circumstances which could not have been within the contemplation of the parties to the agreement, the clause is a gold clause within the scope of the pronouncements in *Feist's* case (supra), and the rent payable under it is such sum in Bank of England notes as represents the value of the intrinsic gold content of 475 sovereigns calculated at the London rate current at the date when payment is due. There is no reason why parties to a domestic document should not evaluate their obligations by means of a gold clause, and nothing in public policy which prevents a landlord who is parting with his land for a long term of years from attempting to protect himself against fluctuations in the value of money.

Decision of Lord Goddard C.J., post, p. 135; [1955] 3 All E.R. 793 reversed.

ACTION.

By a lease dated July 28, 1932, the then trustees of the estate of H. A. Griffin, deceased, demised to Montague Burton Ltd., two shops, Nos. 4 and 6, Queen Street, Cardiff, for 34 years from June 24, 1930. The lease contained a special clause about the rental. The lessors demised the premises to the lessees to hold for the term of 34 years "paying either in gold sterling or "Bank of England notes to the equivalent value in gold sterling "the yearly rental of £1,600 for the first seven years, £1,800 for "the next seven years, and £1,900 for the remainder of the term "to be payable by equal quarterly payments on the usual "quarter days." The lessees covenanted "to pay the reserved "rent at the times and in manner aforesaid." The lessors covenanted that the "lessees paying the rent hereby reserved" should quietly enjoy the premises. The lessors (who held only a lease themselves) further covenanted to use their best endeavours to get an extension or renewal of their own lease; and in the event of their obtaining it, covenanted that they would, if required, grant to the lessees a lease for an equal term to their own " up to a total of 99 years from the date of the commence-" ment of the term hereby granted subject to the payment of the " yearly rent of £1,800 per annum and to the same covenants " and conditions " as were contained in the lease.

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[1] Coinage Act, 1870, s. 6: "Every "contract, sale, payment, bill, note, "instrument, and security for money, "and every transaction, dealing, "matter, and thing whatever relating "to money, or involving the payment "of or the liability to pay any money, "which is made, executed, or entered "into, done or had, shall be made, "executed, entered into, done and had "according to the coins which are cur- "rent and legal tender in pursuance "of this Act, and not otherwise, unless "the same be made, executed, entered "into, done or had according to the "currency of some British possession "or some foreign State."

The lessors did not obtain an extension or renewal of their own lease, but bought the freehold, and then granted to the lessees a new lease. By this new lease made December 30, 1938, the lessors let to Montague Burton Ltd. the same two shops for 99 years from June 24, 1930. The lease contained a similar special clause about the rental. The lessors demised the premises to the lessees to hold for the term of 99 years " paying therefor " yearly during the said term either in gold sterling or Bank of " England notes to the equivalent value in gold sterling the rent " of one thousand nine hundred pounds to be paid without any " deduction except for landlords' property tax land tax and tithe " redemption amounts by equal quarterly payments on March 25, " June 24, September 29 and December 25, in each year, the " proportionate part of the first payment calculated as from " November 5, 1937, to be considered as having become due on " December 25, 1937." The lessees covenanted " to pay the " reserved rent at the times and in manner aforesaid." The lessors covenanted with the lessees that " the lessees paying the " rent hereby reserved " should quietly enjoy the premises. There was a proviso for re-entry " if the rent hereby reserved or " any part thereof shall be in arrear for 21 days after the same " shall become due (whether demanded or not)."

By an assignment dated June 23, 1953, the lessees assigned the premises to the defendants, the Co-operative Insurance Society Ltd.

Until Michaelmas, 1953, the lessors had always been willing to receive the sum of £475 as a quarterly payment, but each demand and each receipt was stated to be without prejudice to their claim for future quarters' rent under the clause in the lease relating to payments in gold or the equivalent in Bank of England notes.

The plaintiffs, William John and Henry David Treseder-Griffin, the present trustees of the estate, now sought to bring the clause into operation and claimed the sum of £7,505, as five quarters' rent alleged to be due in respect of the premises, interest thereon, and a declaration that on the true construction of the covenant to pay rent contained in the lease they, as lessors, were entitled to receive from the lessees 475 gold sovereigns on each quarter day during the term of the lease, or, alternatively, to receive such sum in Bank of England notes as represented the value of 475 gold sovereigns in sterling in London calculated at the date upon which payment was due. They alleged, inter alia, that the lessees, in breach of covenant, had refused to pay the sum claimed, which was made up of quarterly sums representing the value of 475 gold sovereigns in sterling in London on the quarter days September 29, 1953, to September 29, 1954. (The value of one gold sovereign in sterling on the days in question varied from £2 18s. to £3 8s. 6d.)

The lessees, while admitting that they had refused to pay the amount claimed, denied that such refusal was in breach of covenant, and contended that upon the true construction of the clause their obligation was limited to payment of £475 a quarter, which sum they had been at all times and were ready and willing to pay and had tendered. They alleged that the lessors had wrongfully refused to accept the same in satisfaction of the lessees' liability under the clause.

Eustace Roskill Q.C. and *Hugh Griffiths* for the lessors. The propositions in Dicey's Conflict of Laws, 6th ed., p. 727, rule 162, and in Mann, The Legal Aspect of Money (1953, 2nd ed.), pp. 114–116, are adopted. The following four cases are cited in support of those propositions. *Feist* v. *Société Intercommunale Belge d'Electricité*,[2] the effect of which is that gold clauses are generally designed to protect one of the parties to a contract against depreciation of the currency: see in particular the speech of Lord Russell of Killowen.[3] On the basis of that case the present is an a fortiori case as here the parties have clearly anticipated the depreciation of sterling. The House of Lords would have applied the *Feist* construction in *Rex* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft* [4] had the clause under consideration been governed by English law: see the speech of Lord Russell of Killowen [5] to the effect that that construction ought to be adopted in considering gold clauses unless it was excluded by express words. In *New Brunswick Railway*

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[2] [1934] A.C. 161; 50 T.L.R. 143.

[3] [1934] A.C. 161, 168.

[4] [1937] A.C. 500; 53 T.L.R. 507; [1937] 2 All E.R. 164.

[5] [1937] A.C. 500, 556.

Co. v. *British and French Trust Corporation Ltd.*[6] the House of Lords applied the *Feist* construction to "bonds of £100 sterling "of gold coin of Great Britain of the present standard weight "and fineness" but not to coupons annexed thereto relating to interest, as the coupons contained no mention of gold, Lord Maugham L.C. saying[7] that the *Feist* construction ought not to be adopted unless the so-called gold obligation was expressed in clear terms. See also the speech of Lord Thankerton.[8] Reliance is placed on the words of Lord Wright[9] that the clause securing the principal was governed by *Feist's* case[10] and that the bonds were contracts for the payment of money, the amount of which was to be measured by the value in sterling at the due date of 100 gold coins of Great Britain of the standard weight and fineness existing at the date of the bond; he said that "£100 only "defines the sum due so long as English sterling should remain "equal in value to the stipulated gold coin. If sterling should "depreciate . . . relatively to the specified gold coin, £100 merely "provides a measuring point or yardstick from which to determine "how many units of currency will have to be paid to correspond "to the gold value at the due date." That summarizes my argument. In *Syndic in Bankruptcy of Salim Nasrallah Khoury* v. *Khayat*[11] the *Feist* construction was applied to the phrase "gold Turkish pounds": see *per* Lord Wright,[12] delivering the judgment of the Board.

[LORD GODDARD C.J. Does the fact that there is here no element of internationalism strengthen or weaken your case?]

It is submitted that the case is strengthened, first because the lease is governed by English law, and secondly because the lease was made between British subjects and a British corporation to whom no gold was available at the date of its execution. Therefore the reference to gold must have been intended to fix a standard of value.

The argument of illegality under the Coinage Act, 1870, was rejected in *Feist's* case,[13] where section 6 was considered, but the point could not and did not arise on the construction put by the House of Lords on the clause then under consideration. Other statutes which may be relevant to the present case are the Currency and Bank Notes Act, 1914, which enabled the Treasury to issue £1 and 10s. notes but preserved the right to demand gold in exchange, but the first four sections were repealed by section 1 of the Gold Standard Act, 1925, which suspended the issue of gold coins and the right to purchase them. The Currency and Bank Notes Act, 1928, by section 1, substituted the present bank notes for treasury notes. The Gold Standard (Amendment) Act, 1931, which came into force just after the term in the present lease began to run, relieved the Bank of England from any obligation to pay in gold. Section 2 of the Exchange Control Act, 1947, provided for the sale of gold to authorized purchasers and has to be read together with the definition of gold in section 42 (1). Under that Act it might be a criminal offence to tender a sovereign. The Currency and Bank Notes Act, 1954, the latest Act, leaves the law as it was put by Lord Russell of Killowen in *Feist's* case,[13] when the 1928 Act applied, and does not affect the present case. Having regard to the authorities, it is submitted that the lessors are entitled to have paid to them as rent a sum capable of purchasing the requisite number of sovereigns at the current price for gold of the standard and weight of a sovereign.

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[6] [1939] A.C. 1; 55 T.L.R. 260; [1938] 4 All E.R. 747.

[7] [1939] A.C. 1, 18.

[8] Ibid. 25.

[9] Ibid. 30.

[10] [1934] A.C. 161.

[11] [1943] A.C. 507; [1943] 2 All E.R. 406.

[12] [1943] A.C. 507, 511–512.

[13] [1934] A.C. 161.

Neville Gray Q.C. and *R. C. Seddon* for the lessees. This is the first case in which an attempt has been made to apply a gold clause to a purely internal transaction. *Feist* v. *Société Intercommunale Belge d'Electricité* [13] and the other cases cited do not apply because in 1938, when the present contract was made, the country was not on the gold standard. For the principle laid down in *Feist's* case [13] to apply it is submitted that (1) there must be a reference to payment in gold currency existing at the time that the contract is made; (2) the calculation involved must rest on a known value of that currency; and (3) that value must be the value of currency. In *Feist's* case [13] the obligation was created in 1928: it was a contract to pay in gold made at a time when gold was currency. Similarly in *Rex* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft*,[14] where the date of the obligation was 1917. In *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.*[15] the date of the obligation was 1884. *Syndic in Bankruptcy of Salim Nasrallah Khoury* v. *Khayat* [16] was decided on the basis that a Turkish gold pound was currency with an established value.[17] Although when there is a gold standard something can be calculated with reference thereto, that is not possible when there is

[13] [1934] A.C. 161.

[14] [1937] A.C. 500.

[15] [1939] A.C. 1.

[16] [1943] A.C. 507.

[17] Ibid. 511–512.

no existing gold standard. In 1938 gold was not currency; the sovereign merely had a market value.

As to the meaning of "gold sterling," sterling means lawful current money of England. A gold sovereign when not current is not sterling, and strictly "gold sterling" has no meaning at all. "Gold sterling" might have been intended to mean the value of £1 calculated in terms of gold, as is done in declarations made for the purpose of the International Monetary Fund; but the Bretton Woods Agreement is not binding on individuals. If that were the intention, 1,900 £1 notes would satisfy the annual rent. The clause in this lease does not provide for payment in gold coins, but if "gold sterling" could mean gold coins, i.e., sovereigns, then the equivalent value of 1,900 gold sovereigns is £1,900 in banknotes, because a sovereign is current and legal tender for 20s. and no more. If the construction for which the lessors contend were right the obligation from the beginning of the lease would have been to pay a rent, not of £1,900, but of over £3,220, but the rent payable under the lease is £1,900 and no more.

[LORD GODDARD C.J. If that is the meaning there is no point in putting these words into the clause at all. [He referred to *Feist's* case.[18]]]

The essence of *Feist's* case[18] is that there must be a current gold standard, i.e., a definite standard of gold by which currency can be calculated. *Feist's* case[18] did not decide that a provision such as this could operate as a gold clause except where a gold standard was in existence, and the lessors are not entitled to thrust their own interpretation of that case upon their lessees. They are trying to use the clause as a gold clause without any standard of value at all. The words as they stand are not appropriate and do not mean what they are now seeking to say, whatever they intended them to mean, and they must suffer the penalty of not having said it. [Reference was made to Mann, The Legal Aspect of Money, 2nd ed., p. 117.]

A contract made when the sovereign was not current and involving on its true construction payment either according to the gold content of the sovereign or according to the market value of the sovereign would be contrary to section 6 of the Coinage Act, 1870, as being made "according to" coins which were not current and legal tender: for it would treat the sovereign as having a value other than its value as a current coin and other than the amount for which it was legal tender.

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[18] [1934] A.C. 161.

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The true principle of construction to be applied to a document of this sort is summarized in *Cope* v. *Cope*,[19] to which the present case is similar. There a settlement contained the words, "£1,000 "in sterling money of Ireland," and it was held that there was no such thing as sterling money of Ireland at the time when the settlement was executed and that the words "of Ireland" must be rejected. One must find the true intention expressed in the document. Here the essence of the matter is the rent of £1,900. The circumstances existing at the time when the contract was made must be taken into consideration. To read the words in the way contended for by the lessors, having regard to the market value of the sovereign in 1938, would have resulted in a rent of over £3,220 from the very date of the lease. It is inconceivable that the parties should have meant that, and it is submitted that the only possible meaning which the words used can bear is that the rent payable is a sum which can be satisfied by Bank of England notes to the face value of £1,900.

Roskill Q.C. in reply. The parties never intended the rent to be fixed at £1,900 for 99 years from 1930 whatever the fate of sterling. If that were so, then the words under consideration need never have been included at all. The lessors have provided for payment in "gold sterling." Sterling is the lawful currency of the country and it is submitted that the addition of the word "gold" must mean "gold coin."

[Lord Goddard C.J. In an internal transaction between subject and subject or between Crown and subject is one entitled to think of a one pound note as not being equivalent in value to one pound?]

That depends on whether one is regarding the pound as legal tender or is considering its purchasing power. The fact that this is an internal transaction does not affect the matter, nor does it matter that there is no gold standard in existence. [Reference was made to *Sforza* v. *Ottoman Bank of Nicosia*.[20]] It is said that section 6 of the Coinage Act, 1870, imposes a mandatory obligation on all parties to contract in, and only in, the coins which are current legal currency. The House of Lords in *Feist's* case [21] refrained from saying what that meant, but if my submission that gold sterling means gold coins is correct the contract does not offend against section 6 because gold is legal tender, and it is currency although at the time when the present lease was made gold coins were not in current circulation.

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[19] (1846) 15 Sim. 118.

[20] [1938] A.C. 282; 54 T.L.R. 127.

[21] [1934] A.C. 161.

Cur. adv. vult.

1955. Dec. 6. LORD GODDARD C.J. read a judgment in which he stated the facts and continued: The clause in the lease is, or at least would obviously seem to have been, intended to be what is commonly known as a gold clause, which, since the decision of the House of Lords in *Feist* v. *Société Intercommunale Belge d'Electricité*,[1] must be regarded as a definition of the means by which a debt is to be measured and ascertained, and not a definition of the means by which the debt is to be discharged, and to give rise to an obligation to pay in legal tender of the stipulated currency an amount which on the day of payment will be sufficient to buy gold coins corresponding to the nominal amount of the debt. I take this definition from rule 162 of Dicey's Conflict of Laws, 6th ed., as accurately and compendiously stating the result of *Feist's* case [1] and other decisions which followed it, in particular *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.*[2]

So far as I am aware, this is the first time that this class of clause has been the subject of litigation between the parties to what I may call a domestic contract, by which I mean parties who are both British subjects and domiciled in Great Britain. Hitherto the cases on gold clauses have, I think, always been between parties who were subjects of, or at least domiciled in, different jurisdictions, but this cannot, in my opinion, make any difference to the construction of the clause, the object of which is to guard a creditor against the risk of depreciation of currency. The clause I have to construe refers to "gold sterling," a somewhat unusual expression, and I therefore turn at once to the various statutes relating to coinage and currency, for it is common knowledge that gold is no longer used, nor can be, as currency in this country.

The Coinage Act, 1870, prescribed the standard of both gold and silver coins to be issued by Her Majesty's Royal Mint, and provided that gold coins of that standard should be legal tender for any amount, but preserved as legal tender any paper currency which under any Act or otherwise was legal tender. Section 6 of that Act provided that every contract and certain other transactions involving the payment of money should be made and executed according to the Act. At the outbreak of war in 1914 the Currency and Bank Notes Act, 1914, authorized the issue of currency notes of the denomination of £1 and 10s. These notes were issued by the Treasury, and the Act in no way restricted the Bank of England from issuing their notes, which continued to be legal tender. By the Gold Standard Act, 1925, the issue of gold coins was suspended, but the Bank of England was obliged to sell gold bullion in the form of bars of the weight of 400 ounces of pure gold at the price of £3 17s. 10½d. an ounce, and which at that time had always been the price of gold of the standard fineness. The Currency and Bank Notes Act, 1928, in effect transferred the issue of currency notes of £1 and 10s. from the Treasury to the Bank of England.

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[1] [1934] A.C. 161; 50 T.L.R. 143.

[2] [1939] A.C. 1; 55 T.L.R. 260; [1938] 4 All E.R. 747.

In 1931 this country went off the gold standard, and by the Gold Standard (Amendment) Act, 1931, the Bank of England was relieved of any obligation to pay in gold. This, in effect, made Bank of England notes the only currency (I am not referring to silver or bronze), and thenceforward this country had what is commonly known as a managed currency independent of gold, though gold could no doubt be still tendered, but the gold pound, if tendered, would only have the value of 20s., while the price of gold in the market was by then considerably in excess of the statutory price of gold coins fixed in 1925. Finally, by the Exchange Control Act, 1947, no one other than a dealer authorized by the Treasury could buy or sell gold, and all gold had to be surrendered to the Treasury.

From this brief résumé of the various statutes it appears that at the date of the lease bank notes had, in effect, become the only currency in this country, and if the word "sterling" means, as in my opinion it does in this context, current English money, it follows that in strictness there was no gold sterling then in existence. I do not think, however, that anyone could doubt that the object of the clause is to protect the creditor, in this case the lessors, against depreciation of the currency which at the date of the lease consisted of bank notes. It was intended to put the lessors in the same position as if the quarterly payments of £475 had been made in gold coin, as bank notes of £1 and 10s. were of the same denomination as sovereigns and half sovereigns when the pound sterling was a gold pound. In my opinion, therefore, gold sterling should be read as meaning gold coin.

The *New Brunswick* case [3] concerned bonds "of £100 sterling "of gold coin of Great Britain of the present standard weight

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[3] [1939] A.C. 1.

"and fineness." Lord Wright said[4] that the clause in that case was governed as regards the principal obligation by the same construction as that applied by the House to the obligation in *Feist's* case,[5] which was, in effect, that the bonds were not contracts for payment in gold coin as a commodity or in bullion, but were contracts for the payment of money, the amount of which was to be measured by the value in sterling at the due date of one hundred gold coins of Great Britain of the standard weight and fineness existing at the date of the bond. He went on to say: "£100 only defines the sum due so long as English "sterling should remain equal in value to the stipulated gold "coin. If sterling should depreciate, as it has done, relatively "to the specified gold coin, £100 merely provides a measuring "point or yardstick from which to determine how many units of "currency will have to be paid to correspond to the gold value "at the due date."

Applying that to this case, I am of opinion that the plaintiffs' contentions are correct, and that they are entitled to receive each quarter the number of bank notes which would be required to buy from an authorized dealer gold coins of Great Britain of the standard weight and fineness to the value of £475. I ought to say that, in my opinion, section 6 of the Coinage Act, 1870, does not render this lease unlawful. The contract was, I think, made in accordance with the currency which was then legal tender. It follows, in my opinion, that the plaintiffs are entitled to judgment for £7,505, which I understand is an agreed sum if the plaintiffs' contentions are accepted, and for a declaration as claimed.

I am happy to think that this judgment can and, no doubt, will be considered by the Court of Appeal, and perhaps the House of Lords, as in view of the present falling rate of the pound and the length of the lease the amount of money involved is truly formidable.

Judgment for the plaintiffs for £7,505. Declaration that the plaintiffs were entitled to receive as lessors from the lessees 475 gold sovereigns on each quarter day during the term of the lease, or, alternatively, such sum in Bank of England notes as represented the value of 475 gold sovereigns †

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[4] [1939] A.C. 1, 30.

[5] [1934] A.C. 161.

† The word "sovereigns" in this part of the order as drawn up appears to have been inserted in error in place of the words "coins of Great Britain "of the standard weight and fine-"ness," the phrase used in the authorized version of the judgment—THE EDITOR.

in sterling in London calculated at the date upon which payment was due.

E. M. W.

The lessees appealed.

Neville Gray Q.C. and *R. J. S. Thompson* for the lessees. The words in this reddendum clause must be construed in their natural meaning as fixing a rent of £1,900 and providing two alternative modes of paying that rent. Whichever alternative is adopted, " gold sterling " is the standard of value, and the obligation is to pay £1,900 either in actual gold sterling or in bank notes to the equivalent value. " Sterling " means current coin of the realm, and " gold sterling " means gold current coin of the realm. It does not mean the sovereign as a commodity saleable on the London market to an authorized dealer, or the sovereign in relation to a standard of weight and fineness, i.e., the bullion value of its gold content, but only as a coin valued at the amount for which it is current and legal tender, and that is 20s. and no more. That gives effect to every word. The parties by using these words may have been contemplating a possible situation in which sterling was something different from bank notes, or the landlords may have meant to achieve something more; but there is no evidence that the tenant intended the rent to be more than £1,900, and in construing this deed the general principles of construction laid down in *Cannon* v. *Villars*,[1] *Shore* v. *Wilson*, *Lady Hewley's Charities*,[2] and *Cope* v. *Cope*[3] must be applied; one must consider the intention of the parties and the position of gold in this country at the date of the lease. Neither party to the lease could have intended to stipulate in 1938, when the sovereign was not current and when its gold content was worth almost 35s., that the rent should immediately be, not £1,900, as the lease states, but £3,300 odd. That would be trying by this clause, not to guard against depreciation of currency at some future date but to provide for an immediate appreciation of the rent to nearly double the figure agreed. That cannot be right. The question is one of construction and the clause must be construed against the landlord who puts it forward.

Though the so-called " gold clause " cases in the House of Lords and in the Privy Council since *Feist* v. *Société Intercommunale Belge d'Electricité*[4] have gone some way towards saying that where there is a true gold clause it must be construed in the

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[1] (1878) 8 Ch.D. 415.

[2] (1842) 9 Cl. & Fin. 355.

[3] (1846) 15 Sim. 118.

[4] [1934] A.C. 161; 50 T.L.R. 143.

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way in which an agreement to pay £100 in "sterling in gold coin "of the United Kingdom" was construed in *Feist's* case,[4] the present case is distinguishable from *Feist's* case[4] and the other cases which followed it—*Rex* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft*[5]; *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.*[6]; *Syndic in Bankruptcy of Salim Nasrallah Khoury* v. *Khayat*[7]; *Ottoman Bank of Nicosia* v. *Chakarian*,[8] and *Sforza* v. *Ottoman Bank of Nicosia*[9]—for in all those cases there was a reference to payment in gold in a coin which was current in the relevant country at the time and which had a known value. Further, with the exception of *Khayat's* case,[10] the clauses all had a reference to a standard of weight and fineness. There is nothing of that kind in the present case. The only reference is to the rent of £1,900. [Mann on The Legal Aspects of Money, 2nd ed. (1953), pp. 114–117, was also referred to.]

Lord Goddard C.J. in his judgment in this case held that the reddendum clause was a gold clause and that the decisions based on *Feist's* case[11] must be applied. But he went further, for he calculated the rent payable on the basis of the market value of the sovereign, which, because it is used for various purposes in certain Middle Eastern countries, is at present more than the value of its gold content. The practical effect of the Lord Chief Justice's order is to make the rent about £1,000 more than it would be on the basis adopted in *Feist's* case.[11] That cannot possibly be right, for there is nothing in the reddendum about market value. If the words used mean "gold coin" at all, they mean the value of the gold content of the sovereign, and not its commodity value.

Further, the construction for which the landlords contend means that in 1938 the rent was not £1,900 but something like £3,300, and that it is now an amount calculated on the gold content value of 1,900 sovereigns or, alternatively, the market value of 1,900 gold sovereigns. Such a construction would be contrary to section 6 of the Coinage Act, 1870, for the contract would then have been a contract to pay £1,900, not "according "to coins which are current and legal tender," but according to sovereigns which were in 1938 worth 35s. That might be a contract according to pounds or sovereigns, but not regarded as "legal tender," since the Treasury value of a sovereign as legal tender is 20s. [The Currency and Bank Notes Act, 1914, s. 1; the Gold Standard Act, 1925; the Currency and Bank Notes Act, 1928, s. 1; the Gold Standard (Amendment) Act, 1931; the Exchange Control Act, 1947, s. 2 (1), and the Currency and Bank Notes Act, 1954, were referred to.] The Currency and Bank Notes Act, 1928, is relevant, for the contract in *Feist's* case[11] was made in 1928, when a person could get a gold pound for a pound note and that gold pound was worth 20s. and no more. But the Act of 1931 brought the gold standard to an end.

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[4] [1934] A.C. 161; 50 T.L.R. 143.

[5] [1937] A.C. 500; 53 T.L.R. 507; [1937] 2 All E.R. 164.

[6] [1939] A.C. 1; 55 T.L.R. 260; [1938] 4 All E.R. 747.

[7] [1943] A.C. 507; [1943] 2 All E.R. 496.

[8] [1938] A.C. 260; 54 T.L.R. 122; [1937] 4 All E.R. 570.

[9] [1938] A.C. 282; 54 T.L.R. 127.

[10] [1943] A.C. 507.

[11] [1934] A.C. 161.

This is the first case which seeks to set up a "gold clause" in a domestic contract. That is important, for it requires the court to consider what sterling is, namely, that it is current coin and legal tender. A domestic creditor should not be allowed to take advantage of a clause of this kind unless he has made plain that he is requiring something out of the ordinary and has specified exactly what it is. This lease was drawn after *Feist's* case,[11] and if the parties intended to state payment in pounds they ought to have shown what their value was.

Finally, the lessees are bound to pay the rent in "equal "quarterly payments" on each quarter day. How could they, on the landlords' construction, find out the amount due? There could be no equal quarterly payments, for the price of gold sovereigns, either as bullion or as a commodity, fluctuates from day to day and from hour to hour.

Eustace Roskill Q.C. and *Hugh Griffiths* for the lessors. The words in the lease of 1938 can only be construed as Lord Goddard C.J. has construed them in this case. The parties' intention was to safeguard the lessors, who were parting with possession of a valuable freehold property for 99 years, against the risk of depreciation in sterling, which is the currency of the United Kingdom. The primary provision was for payment in gold sterling, with the alternative provision for payment in notes "to the equivalent "value," i.e., the rent in notes equal in value to the gold which is the primary obligation. The parties chose their words advisedly. There is no difference between "gold sterling" and "gold "pounds."

[MORRIS L.J. If gold pounds lost their value so that they were less than the value of pound notes, do you say that the rent would become less than £1,900?]

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[11] [1934] A.C. 161.

Yes; but that does not arise here, for the parties in 1938 did not contemplate that possibility.

[MORRIS L.J. But it does arise here.]

In 1938 the lessees could have tendered the rent in gold or in paper; it would be curious to have put these words in to give the payee an option which he already had in law. It is not now possible to tender gold: see Exchange Control Act, 1947, ss. 2 and 42 (1); but the alternative is available. The meaning of "sterling" is a matter of controversy: see *Bonython* v. *Commonwealth of Australia*[12] and the *Case de Mixed Moneys*,[13] approved by the House of Lords in *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*[14] The *Case de Mixed Moneys*[15] is distinguishable from the present, for this clause provides for payment in gold or the equivalent value in gold sterling; and the provision of two alternatives also makes this case simpler than *Feist's* case.[16]

This is a "gold value" clause and not a "gold coin" clause. A "gold coin" clause provides that the debtor shall discharge his liability in gold coin only; that is *Feist's* case.[16] A "gold "value" clause provides that if for any reason he cannot discharge it in gold coin he must discharge it in the equivalent currency by such amount as will purchase that coin of specified weight and fineness. Though there is no provision as to weight and fineness here, there is the alternative "in Bank of England "notes to the equivalent value in gold sterling."

[DENNING L.J. The clause is not hinged to gold as such but to the value of a particular coin, so you say that the lessors are to have an extra £1,000 a year because of some interest in sovereigns in other countries? What are they used for?]

They are used as bribes among Middle East potentates in oil dealings; and the gold sovereign is also backing for the Greek currency. See also Dicey on Conflict of Laws, 6th ed., p. 727, rule 162, on gold clauses. The decision in *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.*[17] assists here, for that was a "gold value" clause, and Lord Wright[18] appears to have said that the right way to operate such a clause was to take the cost of the sovereign in the market—though it is conceded that at that time there was no divergence in the market

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[12] [1951] A.C. 201; 66 T.L.R. (Pt. 2) 969.

[13] (1604) Davies's Rep. 48.

[14] [1934] A.C. 122; 50 T.L.R. 147.

[15] Davies's Rep. 48.

[16] [1934] A.C. 161.

[17] [1939] A.C. 1.

[18] Ibid. 30.

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value and the gold content value. *Syndic in Bankruptcy of Salim Nasrallah Khoury* v. *Khayat* [19] is directly in point.

[DENNING L.J. But in that case the Turkish pound did not have a market value different from its currency value. It was the gold coin which was important.]

This rent must be paid according to the price of the commercial value of the sovereign. Though there might be practical difficulties in ascertaining the precise amount of rent on the due date, there is nothing novel in that, for both in leases and other contracts provision is often made for calculating the amount to be paid by reference to a formula, e.g., rent fixed by reference to the price of wheat over seven years, or so many tons per weather working day under a charterparty. It is for the debtor to ascertain how much to pay his creditor. He could look in The Times to see what the price of sovereigns had been on the previous day.

Though this may be the first case in this country of a "gold "clause" in a domestic contract, there were two American cases—*Norman* v. *Baltimore and Ohio Railway Co.*[20] and *Perry* v. *United States* [21]—where the Supreme Court held that the implementation of a gold clause in private obligations was only avoided because it was contrary to the declared public policy contained in resolutions of Congress. There is no equivalent public policy in this country. Nothing is more common nowadays than a cost-of-living clause in a service contract. It is difficult to see why a far-sighted national of a country should not protect himself in this way; a fortiori where he is a real property owner.

Section 6 of the Coinage Act, 1870, is obscure; in *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*[22] the House of Lords refused to say what it meant: see *per* Lord Tomlin [23]; but the section cannot be construed to mean that any contract which offends against it is illegal and void, for in that event a barter contract would offend against the section. Where a reddendum clause provides for payment either in sovereigns or in Bank of England notes, both are legal tender, and it is only the quantum of the rent which has to be determined in accordance with a formula.

[HARMAN J. It may be that the section says no more than that it is illegal to fulfil a contract in an obsolete coinage.]

[MORRIS L.J. Or, for instance, in the coinage of Lundy Island?]

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[19] [1943] A.C. 507.

[20] (1934) 294 U.S. 240.

[21] (1935) 294 U.S. 330.

[22] [1934] A.C. 122.

[23] Ibid. 143.

Mr. Gavin Simonds K.C. in *Feist's* case [24] sought unsuccessfully to rely on section 6, and the House of Lords held that giving the *Feist* construction to a bond did not offend against it. The present clause equally does not offend against the section.

Gray Q.C. in reply. Market value can only be introduced into this clause by reading " gold sterling " as " gold sovereigns," but that is not a possible construction. All that *Norman's* case [25] decided was that the United States Congress resolution was not invalid, and therefore the gold clause obligation could not be enforced. No one argued that it was valid because there had been an earlier depreciation of the United States dollar. The argument in *Feist's* case [26] on the Coinage Act, 1870, is not the argument here. The section did not require construction until a difference arose in the value of the pound and of its gold content. The section does not say that payment must be in coin which is current and legal tender, but that it must be " according to " current and legal tender." If this is a contract to pay the rent in sovereigns *as legal tender*, that is in accordance with the section and legal, and equally so if it is paid in notes according to those coins, for the amount for which they are legal tender.

[MORRIS L.J. Would not your construction of the section make it difficult to sell a sovereign?]

No, for it would then be sold as a commodity.

Cur. adv. vult.

March 20. DENNING L.J., stating the facts, said that the form of demand and receipt used by the lessors until 1953 meant that they had accepted £1,900 a year until 1953 and could not reopen those payments, but that they had kept the position open for the future. His Lordship continued: The lessors say that under the special clause the rent here consists of 1,900 gold sovereigns or their equivalent in notes. They point out that 1,900 gold sovereigns are nowadays worth far more than £1,900. Their value changes from day to day and from hour to hour according to the state of the bullion market. If 1,900 gold sovereigns were melted down and the gold content sold in the bullion market, they would be worth, for example, as at September 29, 1955, £5,610 6s. 1d. If they were not melted down but sold just as they are, simply as coins, they would be worth even more; because there are some parts of the world today where sovereigns are much sought after, sometimes by people who wish to hoard them, and at other times by rulers who wish to have them as a backing for their own currency. This hoarding value, too, changes from day to day. The value of 1,900 sovereigns, as coins, for example, as at September 29, 1955, was £6,412 10s. That is the value which the lessors claim and to which the order of Lord Goddard C.J. entitles them.

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[24] [1934] A.C. 161, 164.

[25] 294 U.S. 240.

[26] [1934] A.C. 161.

This is the first case, so far as I know, to come before our courts where the parties have inserted a "gold clause" in a domestic contract where all the parties are within our own country. In external transactions it is, of course, quite common for parties to protect themselves against a depreciation in the rate of exchange by means of a gold clause. But in England we have always looked upon a pound as a pound, whatever its international value. We have dealt in pounds for more than a thousand years—long before there were gold coins or paper notes. In all our dealings we have disregarded alike the debasement of the currency by kings and rulers or the depreciation of it by the march of time or events. This is well shown by the *Case de Mixed Moneys.*[1] Creditors and debtors have arranged for payment in our sterling currency in the sure knowledge that the sum they fix will be upheld by the law. A man who stipulates for a pound must take a pound when payment is made, whatever the pound is worth at that time. Sterling is the constant unit of value by which in the eye of the law everything else is measured. Prices of commodities may go up or down, other currencies may go up and down, but sterling remains the same.

This principle is strikingly illustrated by what happened in 1811 when there was severe depreciation of the pound. A landlord named Lord King then sought to get his tenants to pay their rents at figures which went up according to the price of gold, but he failed. The occasion is thus described by Sir Albert Feavearyear in his book on "The Pound Sterling" (at p. 190): "King announced that he would no longer receive from his "tenants in payment of their rents bank notes at face value. "He proposed to calculate for each tenant the quantity of gold "which would have been purchased at the date of that tenant's "agreement with the rent stipulated therein, and to require from "him the same quantity of gold now, or the amount of paper "money which would be required to purchase it at the present "price." Note the similarity to what the landlords here seek to do. But Lord King did not succeed in his plan. His opponents, says Sir Albert Feavearyear, were not "prepared to "accept the view that a pound was a definite quantity of gold "bullion. They held to the time-honoured principle that a man "who contracted to receive a pound, whether his contract were "a long or short one, must take whatever was by general consent "called a pound when payment was made. This was the "principle which had been followed for a thousand years in spite "of all the many changes of form and value, some of them very "rapid, which the pound had undergone." Parliament immediately passed an Act which affirmed this principle. They put a stop to Lord King's plan. Bank notes were made legal tender for rent equal to gold currency of their face value: see Statute 51 Geo. 3, c. 127, s. 3.

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[1] (1604) Davies's Rep. 48.

The principle which I have stated is so well established that it is disturbing to find a creditor inserting a gold clause in a domestic transaction. I am not altogether sure that it is lawful. In the United States gold clauses are declared by the joint resolution of Congress to be contrary to public policy: see *Rex* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft.*[2] In Canada they are rendered inoperative by the Gold Clauses Act, 1937: see *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.*[3] Many other countries have like legislation. In France, ever since the Franco-Prussian War, the Cour de Cassation has ruled that gold clauses are invalid in the case of internal contracts for payments in France by the French people; but they are valid in the case of international payments, that is, which involve a traffic across international frontiers. Those countries do it, I suppose, to protect their own currencies. If we are now to hold gold clauses valid in England for internal payments, we may be opening a door through which lessors and mortgagees, debenture holders and preference shareholders, and many others, may all pass. We might find every creditor stipulating for payment according to the price of gold; and every debtor scanning the bullion market to find out how much he has to pay. What, then, is to become of sterling? It would become a discredited currency unable to look its enemy inflation in the face. That should not be allowed to happen.

In considering the validity of these clauses, there is another fundamental principle which runs like a thread through the history of our currency. It is this: that no one shall sell or buy, pay or receive, any gold coin lawfully current in this land for more or less than the true lawful value which it does by its denomination import. Thus a gold sovereign, in the days when it was current, was by law worth one pound sterling, no more and no less. This principle was stated in many statutes which were declaratory of the common law but provided special penalties for the breach of it. These statutes were all passed in times when there was a depreciation of the currency. They stretch from 1352 (25 Edw. 3, c. 12), after the Black Death, to 1816 (56 Geo. 3, c. 68), after the Napoleonic Wars.

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[2] [1937] A.C. 500; 53 T.L.R. 507; [1937] 2 All E.R. 164.

[3] [1939] A.C. 1; 55 T.L.R. 260; [1938] 4 All E.R. 747.

A good illustration comes from the year 1810. A man called de Yonge sold 50 gold guineas (of the face value of £52 10s. 0d.) for bank notes of £56 face value plus a silver dollar of 5s., thus making £3 15s. 0d. profit. He was convicted of an offence against the Statute of Edward VI ((1552) (5 & 6 Edw. 6, c. 19)): but the judges sitting in the Exchequer Chamber arrested the judgment, apparently for the somewhat technical reason that there were no bank notes in the time of Edward VI: see *Rex* v. *De Yonge*.[4] Within three weeks, however, Parliament affirmed the principle which I have stated. They passed an Act providing that no one should pay more for guineas than their face value: see 51 Geo. 3, c. 127. During the next 20 years bank notes became freely convertible into gold coin of like value, and there was then no reason for anyone to make any difference between bank notes and gold coin. In 1832, therefore, the old statutes providing for special penalties were repealed (see 2 Will. 4, c. 34, s. 1); but the common law principle remained, and it remains intact to this day. It is not often applicable because gold coin has ceased to be in circulation. Gold coin is now treated as a commodity and can be bought or sold through an authorized dealer for more than its face value, provided that the Treasury gives permission: see sections 1 and 2 of the Exchange Control Act, 1947. Nevertheless, if occasion should arise for a gold sovereign to be regarded as currency, and not as a commodity, the common law principle still holds good, namely, that as currency it is worth one pound sterling, no more and no less. Thus if a party to an agreement, old or new, should stipulate for payment in gold coins, *regarded as currency*, then they must be taken at their face value in sterling, no more and no less. No person can today, any more than in times past, treat the gold coin of this realm (when *regarded as currency* and not as a commodity) as worth more or less than the true lawful value which it does by its denomination import.

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[4] (1811) 14 East 402.

This leads me to the construction of the clause in our present case which requires the lessees to pay the yearly rent of £1,900 by equal quarterly payments " either in gold sterling or Bank of " England notes to the equivalent value in gold sterling."

The phrase " gold sterling " is somewhat odd. " Sterling " is, of course, simply the name of our currency, English pounds, shillings and pence. The origin of the word is uncertain. In the *Case de Mixed Moneys*[5] the word " sterling " is said to be derived from the fact that the early kings employed people from the East to make pure English money. These people were called " Esterlings," and the coins they made were called sterling money. This view is not, I believe, acceptable to antiquarians today. They think the word had its origin in the fact that some of the early coins had a small star on them. However that may be, the phrase " gold sterling " must mean, I think, gold coins of sterling currency, that is, in modern times sovereigns or half-sovereigns.

The lessors start by accepting that meaning, and thence seek to say that the rent here consists of 1,900 gold sovereigns or their equivalent in notes. In arguing thus, they are regarding the 1,900 sovereigns as a commodity and say they are entitled to the value of them as such. I think the argument is fallacious, because the phrase " gold sterling " in the clause does not mean gold coins regarded as a commodity. It means gold coins regarded as sterling currency; and as such 1,900 sovereigns are worth £1,900, no more and no less. A sovereign is, for the purposes of legal tender, worth no more than one pound. No sensible man would, of course, use it as currency to pay his debts, but nevertheless, if he did so use it, it would be only worth £1.

It follows that I do not think that the lessors can possibly recover the hoarding value of 1,900 sovereigns, e.g., £6,412 10s. 0d.; for that is only their value regarded as objects of art or collectors' pieces. Nor do I think that they can recover the value of the gold content, e.g., £5,610 6s. 1d., for that is only their value regarded as bullion. The lessees did not promise to pay a rent of 1,900 gold sovereigns regarded as a commodity, or the realizable value of that commodity in notes. They promised to pay 1,900 pounds; and 1,900 pounds means 1,900 pounds, no more and no less, no matter whether it is paid in gold coins or in paper notes.

[5] Davies's Rep. 48, 60–65.

The point can be made clear by asking here the question which Sir William Jowitt K.C. propounded in *Feist* v. *Société Intercommunale Belge d'Electricité*[6]: "Is the intention of "those words to fix the amount to be paid, or to determine the "manner in which an amount already fixed is to be discharged?" My answer is that the amount to be paid is here fixed by the clause at "one thousand nine hundred pounds." The remaining words, "either in gold sterling or in Bank of England notes to "the equivalent value in gold sterling," merely determine the manner in which the £1,900 already fixed is to be discharged. If those words mean that the £1,900 rent is to be discharged either by 1,900 gold sovereigns regarded as currency or by 1,900 £1 Bank of England notes regarded as currency (as I think they do), there is nothing unlawful in it, but it adds nothing to the obligation to pay £1,900.

By contrast, in the *Feist* case[6] the House of Lords held that the words of the clause there fixed *the amount* to be paid. The company agreed to pay the sum of £100 "in sterling in gold "coin of the United Kingdom of or equal to the standard weight "and fineness existing on September 1, 1928." The House of Lords held that the reference to gold coin of the United Kingdom was not a reference to the *mode* of payment but to the *measure* of the company's obligation. The sum to be paid was to be ascertained by taking the amount of gold contained in 100 sovereigns and seeing what that amount of gold would be worth in sterling. In other words, the clause treated gold coin as a commodity and not as currency. I cannot construe our present clause in that way. The sum to be paid is fixed at £1,900, no more and no less. The reference to "gold sterling" is merely a reference to the mode of payment, not to the measure of the lessee's obligation.

Furthermore, in considering this clause in the lease it is important to bear in mind section 6 of the Coinage Act, 1870. That section, in my opinion, makes it unlawful for a creditor to stipulate for payment of a money debt in any other way than in lawful currency. Its application can be well seen by reference to the law of landlord and tenant. The section does not prevent a landlord from stipulating for a rent to be rendered in kind, as, for example, in so much corn or services, as has been done for centuries: see Blackstone II 41; *Montagu* v.

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[6] [1934] A.C. 161, 163; 50 T.L.R. 143.

Browning[7]; but if he stipulates for a money rent, it must be expressed in terms of a sum of money in lawful currency and not otherwise. Much of our law about rent proceeds on this footing and would not be workable if it were not so. Thus a rent must be a sum certain, or capable of being calculated with certainty. It becomes due in the morning of the day appointed for payment, but it is not in arrear until after midnight. (I pause to ask how anyone can say how much is the rent, if it is to be calculated by reference to the state of the bullion market, which fluctuates from hour to hour.) It is the duty of the tenant on the appointed day to know what amount he owes (without being told what it is), and to have it ready to be paid in cash on the demised premises to the landlord. Although a formal demand is often dispensed with, nevertheless a money rent, in order to be valid, should be capable of being lawfully demanded; and for that purpose it must be demanded on the premises just before sunset in sufficient time to count the money, and the demand must be for the exact amount to a penny.

If the lessor's construction of this gold clause is right, there will not be a sum certain due as rent, and there will never be any " equal quarterly payments." Each quarter's payment will be different from the one before. The price of gold is always on the move. It would also mean that in 1938, when the lease was granted, the rent payable was not £1,900 as stated in the lease, but the hoarding value of 1,900 sovereigns, which was at that time £3,348 15s. That cannot have been intended; whereas if the lessees' construction is right, there is no difficulty at all.

In my opinion, therefore, the rent payable under the lease is £1,900 per annum, no more and no less. I confess that I am glad to be able to come to this conclusion because of the detrimental effect which any other view would have on our sterling currency. I would allow the appeal accordingly.

MORRIS L.J. The difficult question which arises in this case concerns the construction of the words used in the reddendum of the lease. In short the question may be posed thus: what is the reserved rent? It may seem surprising that as to so fundamental a matter the words of a lease should permit of a controversy which, according to how it is resolved, permits of widely divergent results. The lessees contend that the lease provides in terms for a fixed rent of £1,900. The lessors contend that there are qualifying words which have the result that the rent is a varying amount which now is over three times the amount of £1,900 and may well in the future be higher.

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[7] [1954] 1 W.L.R. 1039; [1954] 2 All E.R. 601.

The lease is dated and was made on December 30, 1938. The term was 99 years from June 24, 1930. The rent was payable by equal quarterly payments. It was provided that "the proportionate part of the first payment calculated as from "the fifth day of November one thousand nine hundred and "thirty seven to be considered as having become due on the "twenty-fifth day of December one thousand nine hundred and "thirty-seven."

The parties chose the words by which in the lease they expressed their intention. It now becomes the task of the court to resolve the dispute as to what the words mean and as to the amount of rent the lessors can claim. Some phrases are perplexing and may give rise to speculation or intelligent guess as to what one party may have hoped to stipulate: but where sharp dispute arises it must be for the lessors who claim particular sums to show that the recorded and defined agreement is one under which payment of the sums now claimed must be made.

The words of the reddendum give an option to the lessees (which expression includes their assigns) to pay in one of two ways. They may be expressed as follows. One way is by "paying . . . yearly during the said term . . . in gold sterling "the rent of one thousand nine hundred pounds." The other way is by "paying . . . yearly during the said term . . . in Bank "of England notes to the equivalent value in gold sterling the "rent of one thousand nine hundred pounds." Whichever way is chosen, what has to be paid is stated to be "the rent of "£1,900." The "equivalent" value must presumably denote a value equivalent to the value *of* gold sterling. I think that this is so, although the language actually used is somewhat clumsy in that it reads "to the equivalent value *in* gold "sterling." The phrase used must, I think, denote Bank of England notes to the equivalent value of gold sterling.

If the first of the above recited alternatives is adopted, I cannot think that it matters whether the words "in gold "sterling" come before or after the words "the rent of one "thousand nine hundred pounds." The first alternative is to pay £1,900 in gold sterling. The second alternative is to pay £1,900 in Bank of England notes to the equivalent value of £1,900 gold sterling. If only the first method of payment had been prescribed, then the position today would be that £1,900 could not in practice be paid in gold sterling. I take the word "sterling" as referring to English currency. I consider that "gold sterling" denotes gold coins. At the time when the lease was entered into (December 30, 1938) gold coins were no longer in ordinary circulation.

By the Currency and Bank Notes Act, 1914, the Treasury were authorized to issue currency notes for one pound and for ten shillings, and it was provided by section 1 (1) that "those "notes shall be current in the United Kingdom in the same "manner and to the same extent and as fully as sovereigns and "half-sovereigns are current and shall be legal tender in the "United Kingdom for the payment of any amount." By section 1 (3) it was provided that "The holder of a currency note shall "be entitled to obtain on demand, during office hours at the "Bank of England, payment for the note at its face value in "gold coin which is for the time being legal tender in the "United Kingdom." By the Gold Standard Act, 1925, the Bank of England was relieved of any obligation to pay Bank of England notes in gold coin, though it was provided that such notes should not thereby cease to be legal tender. It was provided by section 1 (1) (*b*) that section 1 (3) of the Act of 1914, which I have cited above, should cease to have effect. It was further provided by section 1 (2) that the Bank was obliged to sell gold bullion, "but only in the form of bars containing "approximately four hundred ounces troy of fine gold": the purchase price, which could be paid "in any legal tender," was £3 17s. 10½d. per ounce troy "of gold of the standard of fineness "prescribed for gold coin by the Coinage Act, 1870."

The Currency and Bank Notes Act, 1928, authorized the Bank of England to issue bank notes "for one pound and for ten "shillings," which were to be "legal tender for the payment of "any amount." Existing currency notes were converted into bank notes. The Bank was required by section 2 (1) to issue bank notes "up to the amount representing the gold coin and "gold bullion for the time being in the issue department"; and an amount in excess which was referred to as the "fiduciary "note issue." The expression "coin" meant coin which was current and legal tender in the United Kingdom: (s. 13 (3)). By the same Act, the Bank was empowered to require a person in the United Kingdom owning gold coin or bullion to an amount exceeding £10,000 "in value," to sell it to the Bank on payment (in the case of gold coin) of the nominal value thereof. The provisions as to the fiduciary note issue contained in the Act

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of 1928 were replaced by those contained in the Currency and Bank Notes Act, 1954. By that Act it is provided that the Bank of England may issue bank notes of such denominations as the Treasury may approve and shall not issue any other bank notes. By the Gold Standard (Amendment) Act, 1931, the gold standard was suspended and the Bank of England ceased to be under obligation to sell gold bullion.

Though gold coins were not at the time of the lease in ordinary circulation, they were legal tender and could have been used. A sovereign was legal tender for one pound. The metallic value of the gold content in the coin was, however, rising. Later it was provided by section 1 (1) of the Exchange Control Act, 1947, that: "Except with the permission of the "Treasury, no person, other than an authorized dealer, shall, "in the United Kingdom, and no person resident in the United "Kingdom, other than an authorized dealer, shall, outside the "United Kingdom, buy or borrow any gold of foreign currency "from, or sell or lend any gold or foreign currency to, any "person other than an authorized dealer." Section 2 contains provisions as to the surrender of gold and foreign currency. The position therefore was that at the date of the lease bank notes constituted for all practical purposes the only currency in the country apart from silver and bronze.

The lease is for a term which ends on June 24, 2029. It is clearly impossible to forecast whether within that period gold coins will be minted and reintroduced for ordinary and general use. The Coinage Act, 1870, prescribed the standard of both gold and silver coins. No one can foresee whether, if before the year 2029 gold coins come back into use, they will be coins of the weight and fineness specified by the Act of 1870. It is, I think, of significance that the lease refers merely to "gold "sterling." There is no provision that the gold sterling is to be of specified weight and fineness. There is no wording comparable with that in *Feist* v. *Société Intercommunale Belge d'Electricité*[8]: the obligation imposed by bonds there in question was to pay "the sum of £100 in sterling in gold coin of the "United Kingdom of or equal to the standard weight and fine-"ness existing on September 1, 1928."

In *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.*[9] the railway company issued a series of mortgage bonds by which the company promised to pay "the sum

[8] [1934] A.C. 161.

[9] [1939] A.C. 1.

"of one hundred pounds sterling gold coin of Great Britain of "the present standard of weight and fineness."

In the present case there is no provision that the gold sterling is to be gold sterling which conforms to the weight and standard existing at the date of the lease. It is to be noted that in *Feist's* case [10] the word "value" is not used. Nor is there an alternative method of payment given, as there is in the present case. In his speech in *Feist's* case [10] Lord Russell of Killowen [11] said that it could in that case be surmised that neither party to the bond could have contemplated payment under the bond being actually made in gold coins. In the present case there is no reason to suppose that the parties did not contemplate actual payment, if not in gold, at least in Bank of England notes. Whatever may be thought of the reference to gold sterling, there was no need expressly to mention Bank of England notes unless payment in notes was contemplated. The provision for alternative forms of payment points to the view that there is definition of the mode in which a debt is to be discharged rather than definition of the means by which a debt is to be measured and ascertained. There was no alternative in the language in *Rex* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft* [12]; nor in the *New Brunswick* case.[13] The language used in the present case has not been "adopted in business and "financial affairs, with a clear understanding of what was "meant," to quote the words of Lord Wright in the latter case.[14]

It is to be noted that in the *New Brunswick* case [14] though the *Feist* [15] construction was held to apply to the mortgage bonds, it did not apply to the interest coupons annexed to the bonds. Lord Maugham L.C. said [16]: "On the other hand, I do not think that "a construction on the lines of the *Feist* [17] decision ought to be "adopted, unless the so-called gold clause obligation is expressed "in clear language, and for myself I do not think that this can "be asserted in reference to the interest payments."

If during the term of the lease gold coins denominated in pounds or half pounds come into use, then even if some future legislation altered the weight and fineness laid down by the Coinage Act, 1870 (whether this be thought unlikely or not), the lessees could discharge their indebtedness by paying £1,900 in such gold coins. But at the present time the lessees cannot pay

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[10] [1934] A.C. 161.
[11] Ibid. 171.
[12] [1937] A.C. 500.
[13] [1939] A.C. 1.
[14] Ibid. 30.
[15] [1934] A.C. 161.
[16] [1939] A.C. 1, 18–19.
[17] [1934] A.C. 161.

£1,900 in gold sterling even if they wished to do so, and, accordingly, in order to pay their rent for the period in issue in this action they must pay £1,900 yearly in Bank of England notes to the equivalent value of £1,900 gold sterling. The question arises about the meaning in this connexion of the word "value." One view is that the word "value" means nominal value. Another view is that the obligation denotes and involves paying in Bank of England notes the sum which would be realized if gold coin of a nominal value of £1,900 were sold. Another view is that the obligation denotes and involves paying in Bank of England notes the cost of purchasing gold coin of a nominal value of £1,900. The conclusion expressed by Lord Goddard C.J. was "that the "plaintiffs' contentions are correct, and that they are entitled to "receive each quarter the number of bank notes which would be "required to buy from an authorized dealer gold coins . . . to the "value of £475." But during the period covered by the claim, it was not lawful, save with Treasury permission, to buy gold coins from an authorized dealer. It is not known how many bank notes would be required to buy from an authorized dealer gold coins to the value of £475. There are no figures before the court showing the purchase price of sovereigns, and it may be—though there is no evidence as to this—that authorized dealers would charge more to a purchaser of sovereigns than they would give to a seller of sovereigns. The authorized dealer might have certain expenses to cover. The provisions of the Exchange Control Act, 1947, prohibit the purchase of sovereigns save with permission. In the period covered, the lessees could not pay rent to the lessors in gold coin: see the Exchange Control Act, 1947. The actual order of the court as drawn differs from the words I have quoted. It declares that "the plaintiffs are entitled "as lessors to receive from the defendants 475 gold sovereigns "on each quarter day during the term of 99 years computed from "June 24, 1930, or, alternatively, to receive such sum in Bank "of England notes as represents the value of 475 gold sovereigns "in sterling in London calculated on the day on which payment "is due." By the phrase "value of 475 gold sovereigns," I assume that what is denoted is the selling price of gold sovereigns. It is lawful to sell gold sovereigns to an authorized dealer, and it was accepted that gold sovereigns have a selling price which is not related to the price of the gold content (which is 11/12ths of the whole), but which also takes into account a scarcity value, and the fact that, for reasons which perhaps cannot be precisely defined, there is a particular demand for sovereigns in certain foreign places.

It is common knowledge that gold sovereigns have for many years not been minted. They were not in circulation, and it may be that they were not being minted, at the date of the lease. The future cannot be divined, but it is possible that by the year 2029 the position will be that no gold sovereigns will have been brought into existence for about a hundred years. Gold sovereigns might be virtually unobtainable, and if so, their selling price might be at a startlingly high level. The figures as to the selling prices at various dates of sovereigns as well as the figures as to the selling price of the gold content which forms 11/12ths of sovereigns were agreed. It would, I think, have been valuable to have had evidence as to the extent at the present time of the sales of sovereigns and as to the factors which bring it about that as coins they realize more than the selling price of the gold which they contain.

But the lease does not mention payment in "sovereigns," and I see no reason why, if payment of rent had been or might in the future be made in gold sterling, it need necessarily be in sovereigns. It could, I think, alternatively, have been made in £5 or £2 pieces or in half-sovereigns—assuming that these pieces had before 1947 been available for circulation. If payment could have been made by handing over 950 half-sovereigns, there is no evidence whether their value or selling price would have been the same as the selling price of 475 sovereigns.

The issue raised in the case turns, therefore, on the meaning in its context of the word "value," and it becomes necessary to examine the contract and to consider which interpretation of the word best permits or assists the performance of the contract. The very fact that the reddendum is phrased as it is lends strong support for the view that someone had an intention (perhaps imperfectly thought out) to give protection to the lessors against a depreciation in the pound. But just as the presence of the words under consideration suggests that someone had in view a clause of the nature of what is commonly known as a "gold clause," so the fact that a word is used whose meaning in the context permits of doubt suggests that it is not certain that everyone concerned had a "gold clause" in mind. Anyone reading the lease without critical consideration of all its words might confidently conclude that the obligation of the lessees was to pay £1,900 rent, and that such obligation could be discharged either by paying £1,900 in gold or by paying £1,900 in notes.

Anyone reading the words in question in 1932 might have been even more confident. But even if it were thought that very probably those concerned did have some notion of inserting some sort of "gold clause," the present problem is not as to what they may have had in mind (as to which in these proceedings evidence would not have been admissible and is not available), but as to what they have in fact agreed.

On the one hand, it seems to me that the view that "value" denotes the selling price of English gold coin is supported by the fact that the early part of the reddendum is in the form in which it appears. It is further supported by the consideration that the contrary view gives no real force and effect to the words "to the "equivalent value in gold sterling." By the words which are used it is perhaps made clear that the rent is not to be paid by cheque and that the lessors insist on gold sterling or bank notes. But even so, on the view put forward by the lessees, no meaning is given to the words "to the equivalent value in gold sterling," unless it be that the lessors were insisting that the Bank of England notes which they would receive were to be of no higher denomination than that of any current gold coins. This would exclude payment in notes of any high denomination.

If on a construction of the words in question in their context in the lease the *Feist* [18] principle is not applicable, then it is a possible view that payment of rent of £1,900 in gold sterling by equal quarterly payments would be achieved if on each quarter day there were handed over either such number of sovereigns as would on a sale of them as sovereigns realize £475, or such number of sovereigns as contained a gold content the selling price of which was £475. But this view gives no real meaning to the words "to the equivalent value in gold sterling," and might involve a violation of section 6 of the Currency Act, 1870, and also would be open to some of the objections to which I later refer.

There are, however, certain considerations which suggest on the other hand that in its context the word "value" must be interpreted as meaning nominal value.

1. The first of the covenants of the lessees is "to pay the "reserved rent at the times and in the manner aforesaid." In the context I think that the reference to "the reserved rent" is to "the rent of one thousand nine hundred pounds." The "times" referred to are March 25, June 24, September 29 and December 25. The "manner" of payment refers to payment

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[18] [1934] A.C. 161.

(a) either in gold sterling or Bank of England notes to the equivalent value in gold sterling; (b) without any deduction except for landlords' property tax, land tax and tithe redemption annuity; (c) by equal quarterly payments. An alternative view would be that the "reserved rent" is the rent of one thousand nine hundred pounds payable either in gold sterling or Bank of England notes to the equivalent value in gold sterling. The "manner" of payment would, on this view, be (b) and (c) above. If, as I think, the first of these two views is to be preferred, then the words being considered in this case are not words which fix the amount to be paid (as in *Feist's* case [18]), but are words which determine the manner in which a stipulated or fixed amount is to be paid. If the second alternative view is adopted, the obligation to pay by equal quarterly payments remains. In *Feist's* case [18] Lord Russell of Killowen [19] recognized that the construction which was then being adopted involved that half-yearly payments of interest in accordance with coupons might in fact not be equal, though the expressed obligation was to pay "by equal half-yearly payments": but he said "I prefer "this to the only other alternatives—namely, attributing no "meaning at all to the gold clause, or attributing to it a meaning "which from other parts of the document and the surrounding "circumstances the parties cannot have intended it to bear."

In the present case, the lessees, by saying that the obligation of the lessees is to pay £1,900 either in gold or in notes, interpret the contract in a way which, while it possibly does not give significance to some of the words now in question, at least does not involve varying them.

2. In the context it seems to me that the contract provides that £1,900 is to be divided into four equal parts, and that, with one proviso as to deduction, one part is to be paid each quarter day. If the plan was that there was to be a rent which was to fluctuate, then it seems to me that language different from the present language with its phrases "the rent of one thousand nine "hundred pounds" and "equal quarterly payments" should have been adopted. It seems quite incongruous that with such phrases the five quarters' rent in the present case should be claimed as in paragraph 6 of the statement of claim to be:—

	£	s.	d.
Rent due for the quarter ended Sept. 29, 1953 ...	1,377	10	0
,, ,, ,, ,, ,, ,, Dec. 25, 1953 ...	1,377	10	0

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[18] [1934] A.C. 161.

[19] Ibid. 173.

		£	s.	d.
Rent due for the quarter ended	Mar. 25, 1954 ...	1,508	2	6
,, ,, ,, ,, ,, ,,	June 24, 1954 ...	1,615	0	0
,, ,, ,, ,, ,, ,,	Sept. 29, 1954 ...	1,626	17	6

3. The provision in the lease as to the first payment which was to be considered as having become due on December 25, 1937, appears to denote that "the proportionate part" was to be calculated by reference to one quarter of £1,900.

4. On December 24, 1938, the selling price of 1,900 gold sovereigns was £3,344 15s. 10d. If the parties had intended to safeguard the lessors from future depreciation of the pound, it would be reasonable to expect that there would be a defined starting figure. If they contemplated that the amount immediately payable was to be nearly £3,350, it seems strange that the stated rent should be £1,900 and not £3,350. If the selling price of gold sovereigns had remained constant for the first year, the result for which the lessors contend is that the lessees' obligations was to pay £1,900 either in gold or by paying £3,344 15s. 10d. in Bank of England notes.

5. As an illustration of the strange result which flows from the lessors' contention, reference may be made to the demand for rent made for the quarter ending September 29, 1954: "To "rent of premises at 4/6 Queen Street, Cardiff. For quarter "ending September 29, 1954, . . . £1,626 17s. 6d." It would not seem to be possible to pay the sum of 7s. 6d. in Bank of England notes.

6. In the respects to which I have earlier referred there would be much uncertainty if "value" were other than nominal or (to use another word) currency value. There would be uncertainty in regard to the denomination of the gold coins to be taken. There would be uncertainty whether, in regard to whichever coins were taken, their "value" was to be computed by reference to their purchase price or to their selling price.

7. The lease provides for deduction by the lessees of "landlords' property tax land tax and tithe redemption annuity." If the quarterly payments are all to be of £475, subject only to any such deduction, then no difficulty arises. But on the basis of the declaration which has been made, can a deduction first be made from £475, leaving the resultant amount to be paid either in gold sovereigns or notes representing the value of gold sovereigns of such resultant number? Or, unless there is payment in gold sovereigns, must there first be an ascertainment of the sum in

Bank of England notes which represents the value of 475 gold sovereigns and must there then be a deduction? A different liability would attach according to which alternative was appropriate.

8. If the parties to the lease were relating the quantum of the reserved rent to the selling price of sovereigns, it seems strange that they did not mention sovereigns. Furthermore, they must have known that sovereigns were not in circulation, and they may not have known whether or not they were being produced. It seems unlikely that parties would agree to pay rent on a basis calculated by reference to the purely artificial scarcity selling price which gold sovereigns might command as the years progress towards the year 2029. If they had in mind the selling price (viewed as bullion) of that amount of gold as is contained in gold coins, they could have said so and would perhaps have specified a particular standard of weight and fineness.

In my judgment there can be compliance with the terms of the lease if the word "value" denotes nominal value, whereas difficulties and anomalies arise if the words of the reddendum are construed as denoting the selling price of sovereigns. Accordingly, I think that the reddendum should be regarded as fixing a rent of £1,900 and as defining or seeking to define the mode by which payment of £1,900 is to be made.

Reliance was placed by the lessees on section 6 of the Coinage Act, 1870. This provides: "Every contract, sale, payment, bill, "note, instrument, and security for money, and every transaction, "dealing, matter, and thing whatever relating to money, or "involving the payment of or the liability to pay any money, "which is made, executed, or entered into, done or had, shall "be made, executed, entered into, done and had according to "the coins which are current and legal tender in pursuance of "this Act, and not otherwise, unless the same be made, executed, "entered into, done or had according to the currency of some "British possession or some foreign State."

It was submitted that the provision that payment must be made "according to the coins which are current and legal "tender" "and not otherwise" shows that for payment purposes coins must have their value as currency and according to their denominations, and must not be given a higher or a lower value. It was submitted, therefore, that in a transaction involving the payment of money a £1 Bank of England note is equivalent in value to a gold sovereign. The meaning of section 6 is not clear, and though I consider that there is much force in the argument which was founded on the section I prefer to base my approach to the case on an analysis of the terms of the lease and on their construction.

It is with much diffidence that I arrive at a conclusion which differs from that of Lord Goddard C.J., but, for the reasons which I have given, I consider that the obligation of the lessees is limited to payment of the sum of £475 per quarter. I would allow the appeal.

HARMAN J. I have the misfortune to differ in opinion from my Lords. Moreover, though I agree with the reasoning of Lord Goddard C.J., I dissent from his conclusion, if it be rightly expressed in the declaration contained in his order as passed and entered. On looking at his judgment, I suspect that he intended a result consonant with *Feist's* case.[20] If so, I should agree; but the declaration contained in the order fails to reach that result. It behoves me in the circumstances to state my own conclusion and to indicate the road by which I have travelled.

This is a case of construction, and it is a truism to say that the parties must be supposed to have intended that which is the true meaning of the written words in which the contract is expressed. The only contract *is* the written words, and the question is not what did the parties want to effect, but to what have they subscribed? If the language used be unambiguous, it must be adhered to, notwithstanding that the result be one which seems unlikely or even capricious. On the other hand, if there be a doubt, it is legitimate to choose that interpretation which seems most consonant with what the parties may be thought to have had in mind, having regard to the surrounding circumstances. Here there is manifestly a doubt. If no meaning at all can be attached to the words in question, no effect can be given to them, and that portion of the document will be void for uncertainty. If, therefore, no sense can be extracted from these words, if on analysis they prove to be so obscure that their meaning remains in doubt, they may be rejected, leaving the lessees' obligation merely to pay £1,900; but that result is for a court of construction a counsel of despair, and it is only in the last resort that the court will throw in its hand and declare itself defeated by the obscurity of the language. The contracting parties, after all, must be taken to have intended the words to mean something, and it ought not to be beyond the wit of man to discover what it was.

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[20] [1934] A.C. 161.

A court of construction, however, is entitled—nay, bound—before embarking on its inquiry, to inform itself of the situation of the contracting parties and the circumstances existing when the contract was made. The relevant facts are that the lessees were at the time already in possession of the shops under a lease of July 28, 1932, which created a term of 34 years from midsummer, 1930. This term must be treated as having become merged in the longer term created by the lease of 1938; but for the latter document it would be still current today. The reddendum in the lease of 1932 contains the same words as are in question in the present lease and reserves a rent rising to £1,900 after the first 14 years. The lease of 1932 also contained an option to the lessees, exercisable in an event which has not happened, to obtain a further lease on like conditions but extending the term up to 99 years, as has in effect been done by the lease of 1938. It appears that the terms of both leases ran from 1930 because the lessees in fact were in possession from that year; the rent under the lease of 1932 ran from November 3, 1930, and that under the lease of 1938 from November 5, 1937. It appears also to be the fact that, during the time when the original lessees retained possession, no demand was ever made for rent beyond the nominal amounts reserved by the leases, but that the lessors always framed their demands for rent and their receipts in such a way as not to prejudice their rights for the future. It seems probable that some understanding existed between the lessors and the original lessees not to make any further demand, for, so soon as the term was assigned to the appellants, demand was made for rent in a sum representing the market price of gold sovereigns at the due date. That demand has been acceded to in the order of the court below. The annual rent on this formula would amount to a fluctuating sum in recent times amounting to as much as £6,500. The appellants say that £1,900 is their total liability. The respondents uphold the order made, but prefer in the alternative an interpretation which would entitle them to a rent calculated by reference to the intrinsic value of the gold content of the appropriate number of sovereigns at the relevant time. This would produce a sum at present about £1,000 a year less than the basis adopted below. As I have said, the judgment leads me to suspect that the higher figure was not the intention of Lord Goddard C.J. These surprising differences have their origin in the circumstances of the times. At Christmas, 1930, when the first payment mentioned in the lease of 1932 was made, this country was on a gold standard under the Gold

Standard Act, 1925, and there was no discrepancy. The country went off the gold standard in 1931 under the Gold Standard (Amendment) Act, 1931, and by Christmas, 1938, the rent on either of the formulae supported by the respondents would have exceeded £3,300. There was no significant difference between the results of these two formulae till 1954, six months after the term vested in the appellants. This curious modern development arose from events in the Middle East rather of a political than of an economic character.

My Lords were influenced by the point raised by Mr. Gray that in 1938 the rent on either formula would have exceeded £3,300. He argued that, if this were intended, £1,900 could not have appeared on the face of the document. There seems to me to be no force in this point when it is remembered that the parties were merely copying a formula adopted in 1932, and that £1,900 was in fact in 1938 being accepted as a discharge. Moreover, if £1,900 were intended in all circumstances to be the measure of liability, this could have been effected simply by leaving out all the words about gold sterling; but these words cannot be supposed to have been put in without any object at all. What, then, can they mean? I agree with Lord Goddard C.J. that they were clearly intended in some way or other to produce the effect of a gold clause, though, of course, the draftsman may have failed in his object.

One more thing seems fairly clear, namely, that the lessees are at liberty to pay £1,900 in gold coin of the realm, for this must be the meaning of the words "in gold sterling." In 1932 and in 1938 this was a legal course, though at all times impracticable, but it has since become illegal under the Exchange Control Act, 1947, ss. 2 and 3. The lessees must, therefore, have recourse to the alternative of payment in bank notes, which would seem to have been provided for the very purpose of avoiding such an impossibility. They may pay in bank notes; but these must have "an equivalent value in gold sterling" to the gold sterling payable under the first alternative. My Lords have accepted the view put forward by the lessees that, as the sovereign as a current coin has never had a greater value than 20s., this from a currency point of view must be regarded as its value, so that gold sterling may be satisfied at 20s. or one £1 bank note to the pound.

I do not feel able to accept this argument, for, so far as I can see, it must in all circumstances deprive all the words about gold sterling of any effect. What are the alternatives? The order

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appealed from rests on the argument that in order to buy 1,900 gold sovereigns, if you could do such a thing nowadays, you would have to pay the price of sovereigns from an authorized dealer under the Exchange Control Act, 1947, and is based on the view that "value" means price so ascertained. For this there is indeed much to be said, but it does produce a result that could not have been within the contemplation of the parties who cannot be supposed to have foreseen the circumstances which have lately forced the value of the sovereign far above the intrinsic value of its gold content. It would indeed be a bizarre result that the liability of an English lessee under a lease of English land should be measured by the cupidity of the unknown ruler of an oasis near the Persian Gulf.

Is there another possible alternative? If these words can properly refer to the intrinsic value of the gold content of the sovereign, then the clause is in its true sense a gold clause. Such clauses have been in use as far back as 1870 or so (see the speech of Lord Wright in the *New Brunswick* case [21]) and their meaning was authoritatively pronounced on in the House of Lords in *Feist's* case.[22] The decision in that case was reached after a great deal of judicial difference, and it has since been followed in a number of cases where the words used were not identical. Parts of it have already been cited by Morris L.J., and I need not read any more. It is true that these are cases with an international flavour, but I see no reason why parties to a domestic document should not adopt the same method of evaluating their obligations.

I find nothing in public policy which should forbid a landlord parting with his land for a long term of years from attempting to protect himself against fluctuations in the value of money. Corn rents are familiar in English law, and rent may be tied to the value of minerals. Section 45 of the Settled Land Act, 1925, provides: "(1) In a mining lease—(i) the rent may be made to "be ascertainable by or to vary according to the acreage worked, "or by or according to the quantities of any mineral or substance "gotten, made merchantable, converted, carried away, or dis-"posed of, in or from the settled land, or any other land, or by "or according to any facilities given in that behalf; and (ii) the "rent may also be made to vary according to the price of the "minerals or substances gotten, or any of them, and such price "may be the saleable value, or the price or value appearing in "any trade or market or other price list or return from time to

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[21] [1939] A.C. 1, 31.

[22] [1934] A.C. 161.

"time, or may be the marketable value as ascertained in any "manner prescribed by the lease. . . ."

Nor do I find the attempt obnoxious in law to the provisions of section 6 of the Coinage Act, 1870. Payment here is to be made in lawful money, either gold coin of the realm or bank notes. The reference to gold is merely a measure of the extent of the obligation, as the gold clause cases show. I respectfully concur in Lord Tomlin's view of the obscurity of the section (*Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*[23]), but I cannot think it pertinent to this case.

In *Syndic in Bankruptcy of Salim Nasrallah Khoury* v. *Khayat*,[24] in the Privy Council, Lord Wright, pronouncing the Board's opinion, said[25]: "Nor were the notes any the less nego-"tiable instruments because of the word 'gold.' That word does "not here import an obligation to deliver gold or pay in gold. "What it does is to import a special standard or measure of "value. This special measure of value may be described suffi-"ciently, though not with precise accuracy, as being the value "which the specified unit of account would have if the currency "was on a gold basis. It is equivalent to a gold clause. 'Such "'clauses' were said by Lord Maugham in *Rex* v. *International* "*Trustee for the Protection of Bondholders Aktiengesellschaft*[26] "to have been 'intended to afford a definite standard or measure "'of value, and thus to protect against a depreciation of the "'currency and against the discharge of the obligation by a "'payment of lesser value than that prescribed.' Gold clauses "were discussed and explained by the House of Lords in the "opinion delivered by Lord Russell of Killowen in *Feist* v. "*Société Intercommunale Belge d'Electricité*.[27] Such clauses "often specify a standard of value based on a particular weight "and fineness of gold. In this case it is taken without objection "that the Turkish gold pound has an established value."

In that case there was not present the element usually found, namely, a reference to a particular weight and fineness of gold; so that it is clear that this element is not essential. A reference, therefore, in the contract to gold or gold coins imports not an obligation to pay in gold coins, but a standard of value. Considering again the surrounding circumstances, it seems to me a legitimate conclusion that this is exactly what the parties here

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[23] [1934] A.C. 122, 144; 50 T.L.R. 147.

[24] [1943] A.C. 507; [1943] 2 All E.R. 406.

[25] [1943] A.C. 507, 511–512.

[26] [1937] A.C. 500.

[27] [1934] A.C. 161.

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were aiming at, and that if the words are capable of this meaning it is one that is most likely to have been within their contemplation. For myself, I find it possible to interpret the word " value " as meaning intrinsic value, and to construe the clause as giving an alternative of payment either in gold coin or in bank notes equivalent in value to the gold content of those coins. In other words, this seems to me to be a gold clause and I would construe it accordingly.

I would, therefore, for myself, vary the order of the Lord Chief Justice by substituting for the declaration which he made some such words as " such sum in Bank of England notes as " represents the value of the gold content of 475 sovereigns " calculated at the London rate current at the date when payment " is due."

Appeal allowed.
Judgment for the defendants.
Leave to appeal to House of Lords granted.

Solicitors: *N. C. Wright, Manchester; Wrentmore & Son for Ewan G. Davies, Cardiff.*

M. M. H.

BEEVIS *v.* DAWSON AND OTHERS.

[1953 B. No. 5164.]

1956
April 11, 12, 13, 16, 17, 18, 19, 20, 23, 24;
May 1.

Finnemore J. and a jury.

Libel and Slander—Practice—Trial—Jury—Justification—Evidence not given by plaintiff—Trial stopped by jury before conclusion of evidence for defence—Award of one farthing damages—Right of plaintiff to give evidence in rebuttal—Whether case for plaintiff concluded—Whether direction should have been given to jury.

Practice and Procedure—Jury, civil action—Verdict—No evidence given by plaintiff—Intervention of jury before conclusion of defendants' evidence—Special direction to jury unnecessary—Whether plaintiff had right to give evidence in rebuttal—Whether plaintiff's case concluded.

In an action for damages for libel the defendants pleaded justification and at the trial both justification and publication were in issue before the jury. The plaintiff did not give evidence himself but a number of other witnesses were called on his behalf, and at the conclusion of their evidence counsel for the plaintiff said: "That is the plaintiff's case." Some of the evidence as to publication given by the witnesses called by the plaintiff was such as unexplained and unanswered might have raised doubts in the mind of the jury as to his bona fides in bringing the action, and counsel for the defendants, in the course of his opening speech, invited the jury to stop the case and award the plaintiff a very small sum of money. Before the conclusion of the evidence for the defendants the jury, having retired at their own request, expressed the view that the plaintiff should receive one farthing damages. No direction or summing-up was given by the judge to the jury before they retired. Objection was taken on behalf of the plaintiff to the verdict of the jury and a new trial was asked for on the grounds, inter alia, (a) that the intervention of the jury was premature since, in view of the plea of justification, the plaintiff had a right to reserve his evidence and to give it in rebuttal and, therefore, the jury had, in effect, found against him as to character before his case was concluded; and (b) that no direction had been given to the jury before they retired:—

Held, (1) that the fact that the plaintiff might give evidence in rebuttal did not mean that his case had not been concluded for, when he had called his evidence and informed the jury that that was his case, that was the case on which he was asking the jury to give him damages, and a plaintiff who reserved his evidence in regard to justification, in particular when matters had arisen in the course of his case which might in the eyes of the jury require explanation by him, ran the risk that because of the intervention of the jury on some other issue the stage at which he might give evidence in rebuttal would never be reached.

Maclaren & Sons v. *Davis* (1890) 6 T.L.R. 372 considered.

(2) That when a jury intervened and intimated that they wished to come to a decision at a stage in the action in which they might properly do so, it was not necessary, nor was it the practice, to give them any special direction. The jury, accordingly, were entitled to intervene in the way in which they did, and their verdict, being one to which they might come on the evidence, should be accepted.

Hobbs v. *Tinling (C. T.) & Co. Ltd.* [1929] 2 K.B. 1; 45 T.L.R. 328 distinguished.

Held, further, that although it was improper for counsel in a civil case to tell the jury that they might stop a case, the fact that counsel for the defendants had so informed the jury was not a matter which invalidated the trial or nullified in any way what happened subsequently.

Alexander v. *H. Burgoine & Sons Ltd.* [1939] 4 All E.R. 568 considered.

Quaere, whether, where there was a plea of justification in a libel action, the plaintiff had an absolute right to give evidence in rebuttal, or whether the admission of such evidence lay in the discretion of the trial judge.

ACTION.

The plaintiff, Frederick John Beevis, claimed damages against the defendants, George John Dawson, Alastair William Graham Cockburn and Jasper Addis, for libel which, he alleged, was contained in, inter alia, a letter signed "The Watcher," alleged to have been published by the defendants about October, 1953, and for slander alleged to have been uttered by the defendants at the time of publication; and the plaintiff also asked for an injunction. On July 2, 1954, interlocutory judgment in default of defence was signed against the third defendant, Jasper Addis, for damages to be assessed at the trial of the action against the first two defendants. The first two defendants, by their defence, pleaded, inter alia, justification, and denied certain of the publications alleged, so that when the action came on for hearing both justification and publication were in issue before the jury.

At the trial of the action a number of witnesses, including the third defendant, Jasper Addis, gave evidence on behalf of the plaintiff, but the plaintiff did not himself go into the witness-box or give evidence on his own behalf, his counsel intimating, in response to comment from counsel for the defendants, that the plaintiff had a right to give evidence in rebuttal after the evidence for the defendants had been heard. At the conclusion of the evidence called on behalf of the plaintiff, his counsel said: "That "is the plaintiff's case." Counsel for the defendants in his opening speech commented on the fact that the plaintiff had not given evidence, and also on the evidence which had been given, and referred to evidence which would be given on behalf of the defendants; he also invited the jury to stop the case and award the plaintiff a very small sum of money. Witnesses were then called and gave evidence on behalf of the defendants, but before the evidence for the defence was concluded the jury intimated that they wished to retire and consider matters amongst themselves. Finnemore J. warned the jury that they must only consider the evidence which they had heard, and not speeches telling them about evidence which they were going to hear, but no direction or summing-up was given. On their return the jury expressed their unanimous view that the plaintiff should receive one farthing damages. The jury were discharged and objection was thereupon taken on behalf of the plaintiff to the verdict of the jury, and a new trial was asked for.

Further facts are stated in the judgment.

Leonard Caplan Q.C. and *N. C. Tapp* for the plaintiff. The verdict means that the jury have found against the defendants on the issue of publication and justification, and against the plaintiff on the issue of character. Where there is a plea of justification the plaintiff in a libel action is entitled to reserve his evidence as to character, to leave it to the defendant to seek to make out the plea of justification, and then to give evidence himself or call other evidence in rebuttal: *Maclaren & Sons* v. *Davis* [1]; *Browne* v. *Murray*.[2]

[FINNEMORE J. Is it not in the discretion of the judge to determine at what stage of the case evidence may be produced?]

If there is a discretion it would not be a judicial exercise of that discretion if the plaintiff were prevented from giving evidence at a stage when he was entitled to do so.

The law on this point is as stated in Gatley on Libel and Slander, 4th ed. (1953), p. 582, and the plaintiff has a right to choose whether or not he will offer all his evidence as to character before or after the evidence for the defence. In the present case the more convenient course was to offer it all afterwards, when what was being alleged against the plaintiff would be known; otherwise matters might have been dealt with which were not going to be raised against him. The jury, therefore, stopped the case and found against the plaintiff as to character without having heard all the evidence and before the whole of the plaintiff's case had been put before them. In such circumstances the plaintiff is entitled to a new trial: *De Freville* v. *Dill* [3] and *Hobbs* v. *Tinling (C. T.) & Co. Ltd.*[4]

The jury did not understand the issues, the law, or the state of the evidence at the time when the case was stopped. The speech for the defendants referred to evidence which would be called, and contained inaccuracies as to the evidence which had been given and as to the law applicable, and comment on the fact that the plaintiff had not given evidence when, in fact, he had a right to reserve his evidence. It was, therefore, all the more important that the jury before retiring should receive a full and careful direction on the issues and the law on the lines laid down in *Hobbs* v. *Tinling (C. T.) & Co. Ltd.*[5]; see, in particular, the observations of Scrutton L.J.[6] Amongst other things, the jury should have been directed that, where there is a plea of justification, the onus of proof is not, as counsel for the defence said, on the plaintiff to establish his own good character, but that he must be presumed to have a good character until the contrary is proved.

It is not for counsel in a civil case, but for the judge, to tell a jury that they may stop a case and to invite them to do so:

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[1] (1890) 6 T.L.R. 372.

[2] (1825) Ry. & M. 254.

[3] (1927) 43 T.L.R. 431; [1927] W.N. 133.

[4] [1929] 2 K.B. 1; 45 T.L.R. 328.

[5] [1929] 2 K.B. 1.

[6] Ibid. 24, 25.

Alexander v. *H. Burgoine & Sons Ltd.*[7] Such an invitation by counsel, in particular when the trial has not reached a stage at which a verdict may properly be given, leads to the difficulties which have arisen in the present case. The verdict of the jury should not be accepted and a retrial should be ordered.

R. Gavin Freeman (with him *J. Platts-Mills*) for the defendants. The question of a new trial and the complaints as to inaccuracies in the speech of counsel for the defence are normally matters for the Court of Appeal, see R.S.C., Ord. 39, r. 1; the circumstances in which the trial judge has a discretion to discharge the jury and order a retrial are quite different from those of the present case. Admittedly it was laid down in *Alexander* v. *H. Burgoine & Sons Ltd.*[8] that it is not the proper practice for counsel in a civil case to invite the jury to stop the case, but that is only a matter of practice and such an invitation by counsel is not a ground for a retrial.

The jury were entitled to intervene at the stage at which they did. *Hobbs* v. *Tinling (C. T.) & Co. Ltd.*[9] and *De Freville* v. *Dill*[10] should be distinguished. In *Hobbs* v. *Tinling (C. T.) & Co. Ltd.*[11] the jury intervened and said that they wished to find for the defendant whilst the plaintiff was still giving evidence and there was no indication that the plaintiff's case was closed; in *De Freville* v. *Dill*[12] the jury found for the plaintiff in the middle of the case for the defendants. In both those cases it was wrong for the jury to intervene and find against a party whose case was not closed. In the present action, however, the case for the plaintiff was concluded before the jury's intervention. Even if he has a right to give evidence in rebuttal, a plaintiff who does not give evidence in support of his own case runs the risk that the jury may stop the trial before the stage of rebuttal is reached, and he cannot complain if they do so, and if they take the view that the action should not have been brought. In this case there was evidence given on behalf of the plaintiff, particularly as to publication, which may have had a very unfavourable effect on the jury, and they were perfectly entitled to take the view which they did. It is submitted, however, that a plaintiff in a libel action cannot give evidence in rebuttal as of right, but that it is a matter in the discretion of the trial judge. [Reference was made to *Maclaren & Sons* v. *Davis.*[13]] The contention that the jury in a libel action where there is a plea of justification may not stop the trial because the plaintiff has a right to give evidence in rebuttal is fantastic because there are two imponderables: first, whether or not the plaintiff will in fact give evidence in rebuttal, and, secondly, whether or not the judge in his discretion will allow him to do so. There is no modern authority where a plaintiff in a libel action has failed to give evidence; it is the invariable modern practice for him to give evidence in support of his own case and not to wait until he has heard the evidence for the defence, and he should not be allowed to do so.

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[7] [1939] 4 All E.R. 568.

[8] Ibid.

[9] [1929] 2 K.B. 1.

[10] 43 T.L.R. 431.

[11] [1929] 2 K.B. 1.

[12] 43 T.L.R. 431.

[13] 6 T.L.R. 372.

It is not the practice, nor is it necessary, for a judge to direct the jury before they are allowed to intervene. The decision on this point in *Hobbs* v. *Tinling (C. T.) & Co. Ltd.*[14] was related solely to the fact that there the jury intervened before the plaintiff's evidence was concluded, and the observations of the Court of Appeal are confined to the case where a jury intimates that it has reached a decision at a stage when it may not properly do so. The verdict of the jury should be accepted and a new trial should not be ordered.

Leonard Caplan Q.C. replied.

Cur. adv. vult.

May 1. Finnemore J. This case falls for decision on the verdict of the jury, returned after seven or eight days' trial. The plaintiff, suing for libel, called his evidence and occupied some five and a half days in putting his case before the court; there was a day and a half opening address and some evidence called for the defence, and then, on the Friday morning when the court assembled, the jury asked by unanimous request that they might retire to their room to consider matters. Before that, and before counsel's address for the defence had concluded, owing to a fortuitous break in the trial, the jury had been allowed to go to their room to discuss matters and had asked, on their return to court, whether they could give a majority decision. They were told that they could not, but that at least showed which way the wind was blowing. On the occasion of the Friday morning when they asked if they could go out, I raised the matter with counsel as to the jury's right to retire. Mr. Caplan then said, as he was perfectly entitled to, that he would prefer the jury to have waited for the end of the particular witness who was then in the box. Certain matters were put to the jury, through me, about the witness who was then in the box, who was really a formal witness producing company files; there was a suggestion that those could be ignored altogether, and Mr. Caplan said that he thought that it would be useful if the jury took the files away with them. This does not in any way—and I am not using it for that purpose—absolve the court from its responsibility and its duty, but I am bound to say that my own impression was that no one was objecting at that stage to the jury retiring, nor did anybody ask for any direction to be given to them or for a further speech or for anything of that sort to be made. Certainly I was under the impression that their retirement and discussion was acquiesced in. Before they finally came back the jury asked a question whether, if they found the libel was justified in substance and in fact, they could find a verdict for the defendants without any damages at all. They were told by me in a written answer that they could, of course, find a verdict for the defendants completely if and when they were satisfied that all the libel—what is commonly called "the sting"—had been justified. The jury came back with a plain indication that they had agreed, and counsel then raised the point that it might be dangerous to take their decision at that stage and reference was made to *Hobbs* v. *Tinling (C. T.) & Co. Ltd.*,[1] which I will refer to later on. It seemed to me that it was inevitable that, at that stage, everybody must know the decision the jury had reached. The jury could not be allowed to go out, as they had been, and then, when they came back after they had considered the matter, be told that the court did not want to know what they had decided or what they had got in mind, but that the case must go on as before. They were asked their decision and said that they were unanimously of the opinion that the plaintiff ought to receive a farthing damages.

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[14] [1929] 2 K.B. 1.

My duty at the moment is to consider the question whether the jury's verdict, under these circumstances, can be accepted. It is not for me (and I am not going to try) to give any detailed judgment on the case or to review in detail the evidence. That is not my province. I have to decide the legal point which arises. Counsel for the defence says that the jury's verdict should be accepted and the usual consequences follow, and the plaintiff's counsel argues (and the matter was argued very strenuously) that I ought to refuse to enter that verdict and should discharge the jury and direct a new trial to take place. In a jury trial in this country the jury decide, and we are very jealous of the rights of a jury and very loth for the court itself to interfere with the decisions on fact made by a jury. It is only in a very strong case indeed that the court will interfere. The jury, not the court, decide the facts, and to enable the court to refuse a verdict it must be a perverse verdict in a real sense. If reasonable men might find a verdict which has been found, no court has jurisdiction to disturb a decision of fact which the law has confided to juries, not judges. One reason might be (and that is, of course, the issue in this case) that the jury take a decision without hearing all the evidence. Normally, as Mr. Freeman argued, a new trial is ordered not by the court which hears the case but by the Court of Appeal, under the provisions of R.S.C., Ord. 39, r. 1. I think that that would apply certainly to the arguments which were addressed to me about Mr. Platts-Mills' conduct of the case, and certain observations and criticisms which were made of what were said to be (of course I am not deciding the matter) inaccuracies in his address to the jury on the evidence which had been given. But there are some cases in which the court at the trial may refuse the jury's verdict and order a new trial, in particular, if the jury wrongly and prematurely give a decision or indicate a very strong view for one side before they have heard the full case, thereby showing that they could not have understood properly what they were supposed to do and could not be trusted thereafter to come to a fair decision between the parties.

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[1] [1929] 2 K.B. 1; 45 T.L.R. 328.

In this country we have always recognized the right of a jury to stop a case when they have heard sufficient. When they have heard all the plaintiff's case, they can find for the defendant, but they cannot do that before the end of the plaintiff's case, any more than they can find for the plaintiff before the end of the defendant's case; but, if they have heard the plaintiff's case, they can find for the defendant without waiting for the defence to be concluded. That is the normal practice in our courts, and it is by no means an unknown thing for a jury to intervene and say that they have heard enough. It is always subject to the proviso that the decision to which they come is one which they could reasonably find on the evidence which has been given before them. Whether the court agrees with them or not is, of course, quite immaterial. My experience has been, apart from the famous case that we shall have to discuss later—and I do not think that anyone argued to the contrary—that under those circumstances it is not usual for the judge to give a summing-up or any special direction to the jury.

The present case was unusual in that the verdict of the jury was a formal verdict for the plaintiff before the evidence for the defence had been anything like concluded. The defendants' counsel makes no complaint about that. Indeed, he could not, because that was what he asked the jury to do. More than once in his opening address, Mr. Platts-Mills told the jury that they could stop the case if they had heard enough. He also indicated to them that they could, if they thought it right and proper, find for the plaintiff for a very small sum of money. In *Alexander* v. *H. Burgoine & Sons Ltd.*[2]—a decision which was overlooked at the time—it was held not to be right for counsel in a civil case to tell a jury that they might stop the case, because that is really a thing which only the judge should tell them. That was not, I think, always so, for in days gone by one certainly heard and read of cases where such a suggestion was made by counsel, but it has now been laid down that it is not a proper thing for counsel to tell a jury. I do not, however, think that it is a matter which invalidates the trial; and although it was wrong, I do not think that it nullifies in any way what happened afterwards.

In the present case, the plaintiff's case had been concluded. At the end of the evidence for the plaintiff, his counsel said, in the usual phrase used in these courts, "That is the plaintiff's "case," and up to that time the plaintiff had not gone into the witness-box himself to give any evidence. Cave J. said in *Maclaren & Sons* v. *Davis*,[3] that if a plaintiff in a libel case did not go into the witness-box, a jury would seldom be disposed to award any more than a farthing damages, but Mr. Caplan put forward two main points why it was wrong for the jury to stop the case at that stage and to return a verdict which, while nominally in the plaintiff's favour, was substantially not so.

The first point was that where, as here, there is a plea of justification, the plaintiff is able to reserve his evidence and give it in rebuttal, if and when it becomes necessary, of evidence given by the defendant to prove the plea of justification; and *Maclaren & Sons* v. *Davis*[4] was cited in support of that contention. That was not a case of justification, but there was evidence in mitigation of damages, publication being admitted. Huddleston B. refused to allow the plaintiff to give evidence in rebuttal, and his decision was reversed. Although there are many differences between that case and this, the plaintiff relies on it, and it does establish the principle that there may be cases in which it is right for the plaintiff, even in a libel action, to say: "I am not going "into the box myself yet. I have proved the libel, or it has been

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[2] [1939] 4 All E.R. 568.

[3] (1890) 6 T.L.R. 372, 373.

[4] 6 T.L.R. 372.

"admitted. You prove what you say against me and then, if it "is necessary, if you put forward any evidence, I will give my "evidence in rebuttal." There was some argument whether that was an absolute right on the part of the plaintiff, or whether it was a matter subject to the discretion of the judge, which, of course, might include consideration of other issues which have to be decided. In *Maclaren & Sons* v. *Davis*[4] Cave J., referring to the case of *Wright* v. *Willcox*,[5] said[6] that that case "showed that it "was in the discretion of the judge, subject to the reviewal of the "court, to determine at what stage of the cause evidence might "be produced."

In *Browne* v. *Murray*[7] Lord Abbott C.J. said in plain terms that a plaintiff could content himself with proof of the libel and leave it to the defendant to make out his justification. I note that in the notes to that case[8] in the report other cases are referred to, and that in *Rees* v. *Smith*[9] Lord Ellenborough is reported as saying that the general rule was that "when by "pleading or by means of notice, the defence was known, the "counsel for the plaintiff was bound to open the whole case in "chief, and could not proceed in parts; that when it is known "what the question in issue is, it must be met at once." In the present case, as distinct from the much wider case that was put in *Maclaren & Sons* v. *Davis*,[10] there were, as there must be, full particulars of justification, exactly what the plaintiff had to meet. However that may be, there are those authorities. No one was able to find in the books or otherwise any modern case where the plaintiff in a libel action had failed to go into the witness-box as part of his own case. The fact that the plaintiff may give evidence in rebuttal does not, I think, mean that his case is not closed. When he has called his evidence and says: "That is my "case," that is the case on which he is asking the jury to decide, and that is the case on which he is asking the jury to give him damages.

Justification was not the only issue raised, and it has been argued that there was evidence given already in the plaintiff's own case which might be thought to need his answer or explanation and which, unanswered and unexplained, might have created a very unfavourable impression on the jury. Publication was in issue. It was opened in regard to the defendant Dawson (who was the principal person), that he had entered on a campaign of dissemination of the anonymous letter which contained the libel. In fact, I think that at the most some four or five people, all close associates of the plaintiff and the defendant Dawson, were concerned. There was plain evidence in the plaintiff's own case of some publication, especially to Mr. George Beevis, the plaintiff's brother, and to Miss Collins, his secretary. The circumstances of that were perhaps a little odd, because one witness, if not two, agreed that it was a very discreet and limited publication, and the showing of the letter to Mr. George Beevis and Miss Collins was accompanied by the defendant Dawson's statement that, of course, he did not bother about it, and he himself had had also at the same time an anonymous letter; and still more odd, perhaps, after this publication the defendant Dawson sent a bottle of whisky to the plaintiff, who was in bed with influenza. The brother seems to have acquiesced in it and Miss Collins conveyed it, together with some advice that was suggested about taking it with hot milk. That publication had not been denied. It has been challenged by the suggestion that the appointment at the Star Tavern on October 25 was an arrangement whereby Dawson was to show the letter to George Beevis at the request of his brother, the plaintiff, who was ill in bed; but, of course, it remained there, because that evidence had not been given when the case was stopped.

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[4] 6 T.L.R. 372.
[5] (1850) 9 C.B. 650.
[6] 6 T.L.R. 372, 373.
[7] (1825) Ry. & M. 254.
[8] Ibid. 255.
[9] (1816) 2 Stark.N.P.C. 31.
[10] 6 T.L.R. 372.

There was another matter which may have been thought by the jury to be far more serious. A witness, Mr. Pyper, was one of the people to whom publication was alleged on which damages were claimed; his evidence was that he had gone deliberately and asked for the letter to be shown him, on the invitation or on the instructions of the plaintiff himself. In law that could not be a publication, but it may be something more than that. If a plaintiff deliberately gets someone to go and get a document shown to him and then claims that that is a publication and claims damages on it, I do not think that he can complain very much if people think that that is not honest conduct. Obviously, if his legal advisers had known the true facts, they would not have dreamed of putting Mr. Pyper in the box as though he were an honest witness of an honest publication. The jury had before them, therefore, on the plaintiff's own case, this matter of what they may have considered deliberately inviting or inciting publication and then, not honestly or properly, claiming damages thereon. One might have thought that the plaintiff should have answered or explained that incident if he was really jealous to preserve and defend his own reputation.

There was also the evidence of Mr. Hatton which required consideration; he was a witness of whom the jury may have formed their own opinion, having seen and heard him, and having heard his own description of some of his activities, at least on the tape recording machine. Mr. Hatton denied that he was what is commonly called maintaining this action, but by the time the evidence had finished it looked as though that is very much what he was doing, because he agreed that he had either found or guaranteed a sum of some £750, he was seeing that the plaintiff did not starve or was keeping a roof over his head while the case went on, and also he had admitted that he had previously done a similar thing for the same plaintiff to the extent of some £2,000 in another action in which he had been involved with somebody else. More than that, another witness, Mr. McLaglen, gave evidence that on an occasion when Mr. Hatton and the plaintiff were together, Mr. Hatton said, boldly and plainly: "I am behind Fred in this. He need not worry about "money. I am seeing him through," and also said: "We are "all right," or words to that effect, "because, on what we know "about him, Dawson dare not go into the witness-box." Those are matters on which I pass no judgment. I merely say: can it be complained of that a jury took the view: "Those are matters "which ought to have been answered and dealt with by the "plaintiff, if he wants damages from us of any real amount. If "they are unanswered and we accept them, do they not show that "the gravest doubts must be cast on his bona fides in this "particular action?"

Can the plaintiff avoid what otherwise, I think, would be the inevitable consequence by saying: "As there was a plea of justification here, I was entitled to keep my evidence till evidence "of justification was given and then give it in rebuttal"? I do not think that he can. While he may be able to keep his evidence in regard to justification as evidence given in rebuttal, I think that he takes the risk that on some other issue he may never reach that stage, because of the intervention of the jury. Can it be said that the jury who take that view were acting unreasonably or that the verdict which they reached was a perverse one?

There was evidence given by Mr. Jasper Addis, to which I think I ought to refer because, if accepted, it casts a very different light on all these proceedings. He was a defendant and, strictly, still was a defendant, because judgment had been signed against him.

He appeared to resent that, and he wrote a letter to the plaintiff offering to make him a statement. He wrote other letters after that, letters which the jury might have thought were rather sinister. He said in one of them, which he wrote to the plaintiff's solicitors, that the plaintiff would realize that his (Addis's) evidence would, in all likelihood, win him his case, and without it he would stand very little chance indeed, and he again said something similar to what Mr. Hatton had said, that Dawson could not possibly survive cross-examination on the lines disclosed in his (Addis's) statement. Then he added, to make no mistake about the matter, that that would place the plaintiff under an obligation to him. There was another matter more important than that; that is, that Mr. Addis, in these very proceedings, had previously sworn an affidavit which was in flat contradiction of every important thing that he said in the witness-box in this court, and he himself said in the plainest terms that it was a false and perjured affidavit. It was said by counsel for the plaintiff that it was an unprecedented step, or something approaching it, to call Mr. Addis. It was certainly a very bold step; but could anybody be surprised if, having seen and heard Mr. Addis, having known what he swore in his affidavit, and knowing what he wrote in his letters, the jury said: "We are "just not going to rely on a single word he has said to us"? The importance of that (because I am not going further into other matters in the evidence) is that Mr. Caplan pressed on me the alleged publication at Prunier's Restaurant. It is enough to say that that publication depends on the evidence of Mr. Addis and his reliability.

The second point—and it is really partly parallel with what I have called the first point—is that there was here no direction given by the court to the jury when they retired, as there should have been. On the first point I think, as I have indicated, that as a matter of law the plaintiff's case had been concluded and the jury, therefore, were entitled to say, on that case, "We have "heard enough and have come to a certain decision"; and, on the evidence that had been given up to that point, the evidence which had been called by the plaintiff himself, the jury would have been entitled to say that they thought little or nothing of the bona fides of the plaintiff in bringing and pursuing this particular action, most of all having regard to the incident with regard to procuring the deliberate publication to Mr. Pyper and then claiming that as a basis of damages. The second point is: allowing all that for the moment, that if the jury go out to consider a case of this sort under these circumstances, they must receive a full and careful direction by the judge. I said earlier on, and I repeat it, that my own experience, for what it is worth, has been that where the members of a jury have intimated that they have come to a certain decision, and have heard all the evidence for the side against which they are likely to find, it is not the practice to say to them: "Before "you do that, you must listen to what I have got to say to "you." Against that there has been put, quite rightly, and pressed strongly, the case of *Hobbs* v. *Tinling* (*C. T.*) *& Co. Ltd.*[11] I gave no direction to the jury. There is no question about that. I did give them one warning which I thought it right to give them. They had listened to a very long speech of Mr. Platts-Mills, which indicated in a good deal of detail the evidence that he was going to call, and I did think it right to warn the jury that they must not act on that speech or, indeed, any speech, and that they must act only on evidence which had actually been called and proved before them in the witness-box.

The argument which Mr. Caplan developed, that in circumstances of this sort there must be a full and careful direction by the judge, really rests entirely on *Hobbs* v. *Tinling* (*C. T.*) *& Co. Ltd.*[11] I do not think that it is the normal practice for a direction to be given if the jury stop the case at a proper point; that is, after the plaintiff's case has been heard and the evidence in support of it given to the jury. Obviously, if the case goes on, then all points have to be put to the jury, and all the points which Mr. Caplan mentioned to me, quite properly, one by one, are points on which it would have been my duty to have directed the jury. *Hobbs* v. *Tinling* (*C. T.*) *& Co. Ltd.*[11] is, I think, a rather special case and is governed by one thing; that in that case the jury intervened at what was plainly the wrong time. They intervened to say that they wanted to find a verdict for the defendant before the plaintiff's case had been finished. That is where this argument, of course, is parallel to the argument on what I call the first point. That, on any showing, is wrong. The judge may do several things in those circumstances. He may discharge the jury altogether, on the ground that he cannot expect a fair result, as Avory J. did in *De Freville* v. *Dill*,[12] where the jury found for the plaintiff before the defence had been finished. He may, if he thinks it right, continue the trial, subject to giving the jury a very careful direction. I think it will be found, on looking at *Hobbs* v. *Tinling* (*C. T.*) *& Co. Ltd.*,[13] that the decision is dependent on this first fact, that the jury tried to stop the case before the plaintiff's case was finished; under those circumstances, it might reasonably be argued that the jury cannot have understood what they were doing, or that they were unfairly taking a line against the plaintiff when they obviously ought not to have done so, because they had not even heard his case.

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[11] [1929] 2 K.B. 1.

[12] (1927) 43 T.L.R. 431; [1927] W.N. 133.

In such circumstances what does the judge do? Scrutton L.J. said[14]: "He may, if he thinks this premature intervention "renders it impossible for the trial to proceed with justice, "discharge the jury and order a retrial." That was what was done in *De Freville* v. *Dill*.[15] Then[16]: "(2) If he thinks justice "can still be done, he may inquire of the party whose case has "not been completed if he desires to complete it, and that party "has the right to complete his case, to re-examine any witness "under cross-examination, to call any other evidence he desires, "and to address the jury, if he desires. . . . The judge is, in my "opinion, bound to sum up to the jury sufficiently to make "clear what are the issues they have to decide," and then he goes on about the particular facts of that case: "and especially where "the evidence largely consists of answers and complete or partial "denials to the assertions of cross-examining counsel in the form "of questions." Scrutton L.J. again emphasizes the same point[17]: "Secondly, and independently, that when the jury purported to decide against the plaintiff before his case was finished, "they should have received a direction to listen to the re-examination, if any, and the speech of counsel for the plaintiff, and "should then have been directed carefully as to the issues they "had to try and the nature of the evidence they had listened to." That is something which is applicable to a case where a jury has intervened prematurely and tried to find against a person before it has heard that person's case. I do not think that it applies to a case where they have heard the case for the plaintiff and intervene only after that case has been completed.

That is all that I need to say now. There were many other points which were canvassed; there were other matters of evidence for the jury from the plaintiff's own case, through which I am not pretending to go. I have come to the conclusion that the jury were entitled to intervene in the way in which they did. I do not

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[13] [1929] 2 K.B. 1.
[14] Ibid. 24.
[15] 43 T.L.R. 431.
[16] [1929] 2 K.B. 1, 24.
[17] Ibid. 33.

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Beevis v. Dawson.

Finnemore J.

think that it was incumbent, or necessary, on the court to give them any special direction, and I do not feel able to say that they came to a decision to which 12 reasonable people could not have come after hearing the evidence. That means that I think that I ought to accept their verdict. There will be judgment against the first two defendants for a farthing, and an assessment of damages against the third at the same figure.

Judgment for the plaintiff.

Solicitors: *C. Butcher & Simon Burns; R. K. George.*

J. F. L.

C. A.

1955
May 18, 19, 20, 23;
June 20, 27;
July 4;
Oct. 26.

Denning, Birkett and Romer L.JJ.

ROMFORD ICE AND COLD STORAGE CO. LTD. *v.* LISTER.

[1953 R. 229.]

Master and Servant—Contract of service—Implied term—Injury to fellow-servant by negligent driving of motor-vehicle by servant—Covered by employers' liability policy but not by motor policy—Damages and costs awarded against master — Whether implied contract by servant to indemnify master—Master's right to contribution or indemnity under Act of 1935*—Whether master under duty to insure servant against such risk—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *ss.* 35 (1), 36 (1) (*b*)*—Law Reform (Married Women and Tortfeasors) Act,* 1935 (25 *&* 26 *Geo.* 5, *c.* 30), *s.* 6 (1) (2).

Vicarious Liability—Indemnity for servant. Joint tortfeasor—Contribution. Road Traffic—Third party insurance. Insurance—Subrogation—No payment—Express right to bring proceedings.

On January 26, 1949, the defendant, a lorry driver in the employ of the plaintiffs, taking his father with him as mate, drove a lorry to a slaughterhouse in order to collect some waste. After driving into the slaughterhouse yard he backed the lorry and in so doing injured his father.

The father brought an action for damages against the plaintiffs for personal injuries occasioned by his son's negligence. The plaintiffs were insured under two policies; one, a motor-vehicle policy which satisfied the requirements of the Road Traffic Act, 1930,[1] but did not cover the defendant from liability for an injury caused to a fellow-servant; the other, an employers' liability policy at Lloyd's, contained a clause permitting the underwriters to prosecute in the name of the assured for their own benefit any claim for indemnity or damages or otherwise, and to have full conduct of such proceedings. On January 29, 1953, McNair J. gave judgment for the father, whom he found one-third to blame, and awarded him £1,600 damages and costs.

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[1] Road Traffic Act, 1930, s. 35 (1): "Subject to the provisions of "this Part of this Act, it shall not "be lawful for any person to use, "or to cause or permit any other "person to use, a motor vehicle on "a road unless there is in force in "relation to the user of the vehicle "by that person or that other person, "as the case may be, such a policy

On January 23, 1953, the underwriters of the employers' liability policy had issued a writ in the name of the plaintiffs claiming that they, as joint tortfeasors, were entitled to contribution from the defendant under the provisions of section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935,[2] and to damages for the breach of an implied term in the defendant's contract of service that he would use reasonable skill and care in driving the lorry. The plaintiffs were only nominal plaintiffs. The effective plaintiffs were the insurers. Ormerod J. gave judgment for the nominal plaintiffs for the full sum claimed.

On appeal, the defendant took a preliminary point that the action was premature in that the writ had been issued before any liability had accrued under the father's action. In order to ensure that the case should be heard on the merits the Court of Appeal, by consent, gave leave for a second action to be brought and consolidated with the first, and both were considered together:—

Held, by Birkett and Romer L.JJ., Denning L.J. dissenting, (1) that in the first action, though the claim to contribution

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"of insurance . . . as complies with "the requirements of this Part of "this Act."

S. 36 (1): "In order to comply "with the requirements of this Part "of this Act, a policy of insurance "must be a policy which—. . . (*b*) in-"sures such person, persons or classes "of persons as may be specified in "the policy in respect of any liability "which may be incurred by him or "them in respect of the death of or "bodily injury to any person caused "by or arising out of the use of the "vehicle on a road: Provided that "such a policy shall not be required "to cover—(i) liability in respect of "the death arising out of and in the "course of his employment of a per-"son in the employment of a person "insured by the policy or of bodily "injury sustained by such a person "arising out of and in the course of "his employment; . . ."

[2] Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6: "(1) Where damage is suffered by any "person as the result of a tort . . . "(*c*) any tortfeasor liable in respect "of that damage may recover con-"tribution from any other tortfeasor "who is, or would if sued have been, "liable in respect of the same "damage, whether as a joint tort-"feasor or otherwise, so, however, "that no person shall be entitled to "recover contribution under this "section from any person entitled to "be indemnified by him in respect of "the liability in respect of which the "contribution is sought. (2) In any "proceedings for contribution under "this section the amount of the con-"tribution recoverable from any per-"son shall be such as may be found "by the court to be just and equit-"able having regard to the extent of "that person's responsibility for the "damage; and the court shall have "power to exempt any person from "liability to make contribution, or "to direct that the contribution to be "recovered from any person shall "amount to a complete indemnity."

under the Act of 1935 was premature in that it could not arise until the liability in damages of the nominal plaintiffs to the father had been established, the breach of the alleged implied term that the defendant should use due skill and care had occurred before the issue of the writ, so that the first action was maintainable on the latter issue.

George Wimpey & Co. Ltd. v. *British Overseas Airways Corporation* [1955] A.C. 169; [1954] 3 All E.R. 661 applied.

(2) That the claim in damages for breach of contract was established since:

(i) There was an implied term in the defendant's contract of service that he would carry out his duties with reasonable skill and care, and the nominal plaintiffs had suffered damage by his failure to do so.

Observations of Willes J. in *Harmer* v. *Cornelius* (1858) 5 C.B. (N.S.) 236, 246–247, and of Hodson L.J. in *Jones* v. *Manchester Corporation* [1952] 2 Q.B. 852, 865; [1952] 1 T.L.R. 1589; [1952] 2 All E.R. 125 and *Semtex Ltd.* v. *Gladstone* [1954] 1 W.L.R. 945; [1954] 2 All E.R. 206 applied.

(ii) The claim was not defeated by the fact that the nominal plaintiffs were joint tortfeasors, since they were only vicariously liable for their servant's negligence.

Merryweather v. *Nixan* (1799) 8 T.R. 186 distinguished.

Observations of Best C.J. in *Adamson* v. *Jarvis* (1827) 4 Bing. 66, and of Warrington L.J. in *Weld-Blundell* v. *Stephens* [1919] 1 K.B. 520, 536; 35 T.L.R. 245 applied.

(iii) No term could be implied in the defendant's contract of service that the nominal plaintiffs, although insured, would not seek to recover from him any damages which they might have to pay by reason of his negligence.

(3) That a defence founded on the Road Traffic Act, 1930, and the implications arising out of its provisions, to the effect that the nominal plaintiffs had required the defendant to drive on the highway without proper insurance cover, failed, since the accident did not arise out of the use of a vehicle on a road. There was no implied term in the defendant's contract of service imposing on the nominal plaintiffs the duty of insuring him against liability for injuries caused to his fellow-servants.

(4) That (apart from the preliminary point) the judge had acted rightly in granting a full indemnity to the nominal plaintiffs under section 6 (2) of the Act of 1935; so that the nominal plaintiffs were entitled in the first action to damages for breach of contract, and in the second action to such damages and to an indemnity under the Act.

Per Denning L.J., dissenting. The true basis of any action which the nominal plaintiffs could bring against the defendant lay not in contract but in tort. Apart from the Act of 1935, they were debarred from suing in tort as they were themselves tortfeasors, so that the preliminary objection succeeded. They could claim under the Act of 1935 but were met by an implied term in the defendant's contract of service that the nominal plaintiffs, if insured, would not seek contribution or indemnity from him. The case came also within the power of the court under the Act to exempt a person from contribution. Further, the accident arose out of the use of a vehicle on a road; the nominal plaintiffs were, by virtue of the Act of 1930, under a duty to insure the defendant against the risk to his fellow-servants; they had required him to do something unlawful by causing him to drive the vehicle without such insurance cover, and could not, in the circumstances, call upon him to indemnify them. I do not think that *Semtex Ltd.* v. *Gladstone* (supra) and *Lees* v. *Motor Insurers' Bureau* [1952] 2 T.L.R. 356; [1952] 2 All E.R. 511 were rightly decided.

Decision of Ormerod J. affirmed.

APPEAL from Ormerod J.

The defendant was a lorry driver in the employment of the plaintiff company. On January 25, 1949, he drove a lorry of the plaintiff company to a slaughterhouse in order to collect some offal, taking with him as mate another employee who happened to be his father. While backing the lorry in the yard of the slaughterhouse the defendant caused injuries to his father, who brought an action against the plaintiff company and, on January 29, 1953, obtained judgment for £1,600 and costs, being himself found one-third to blame.

The plaintiff company had a motor-vehicle policy which covered them and the defendant as their driver against third party risks to the public in accordance with the provisions of the Road Traffic Act, 1930, but did not cover injuries to servants of the plaintiff company other than the driver of the vehicle. They also had a Lloyd's employers' liability policy under which the accident to the father was covered. This policy provided that the underwriters were empowered "to prosecute in the name of "the assured for their own benefit any claim for indemnity or "damages or otherwise, and shall have full discretion in the "conduct of any proceedings, and in the settlement of any "claim, and the assured shall give all such information and "assistance as the underwriters may require." By virtue of this power the underwriters, without consultation with the plaintiff company, instituted an action in their name against the defendant on January 23, 1953, six days before the father obtained judgment. In the action the nominal plaintiffs claimed damages for breach of contract, based on an implied term in the defendant's contract of service that he would drive with reasonable skill and care; they also claimed, as joint tortfeasors, contribution or indemnity from the defendant under section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935.

Ormerod J. held in favour of the nominal plaintiffs on both issues, and granted them an indemnity under the Act of 1935 on the ground that they were innocent parties and the defendant was not entitled to anything by way of mitigation.

On the hearing of the appeal the defendant raised a preliminary objection that the action was premature, as the writ had been issued before the judgment in the father's action. To ensure that the substantive matters in the appeal should be argued and decided, the court, by consent, gave leave for a second action to be brought and consolidated with the first, the pleadings and evidence in the first action to stand as if they had taken place in the second action.

Christopher Shawcross Q.C. and *Harry Lester* for the defendant.

Patrick O'Connor for the plaintiffs.*

The following are among the cases cited in argument but not referred to in the judgments: *Richards* v. *Cox* [3]; *Page* v. *Scottish Insurance Corporation* [4]; *Ryan* v. *Fildes* [5]; *Marsh* v. *Moores* [6]; *Tattersall* v. *Drysdale* [7]; *Nance* v. *British Columbia Electric Railway Co. Ltd.*[8]; *Buchanan* v. *Motor Insurers' Bureau* [9]; *Izzard* v. *Universal Insurance Co. Ltd.*[10]; *Commercial Union Assurance Co.* v. *Lister* [11]; *John Edwards & Co.* v. *Motor Union Insurance Co. Ltd.*[12]; *Harrison* v. *Hill* [13]; *Bugge* v. *Taylor* [14]; *Stapley* v. *Gypsum Mines Ltd.*[15]; *National Coal Board* v. *England.*[16]

Cur. adv. vult.

Oct. 26. The following judgments were read.

Denning L.J. Two men named Lister, father and son, were employed by the Romford Ice and Cold Storage Co. Ltd., whom I will call "the Cold Storage Company." Their task was to collect waste and take it to the factory. On January 26, 1949, the son drove the lorry from the company's premises to a slaughterhouse in Old Church Road, Romford. The father went with him. The son drove the lorry through the main gates into the yard of the slaughterhouse. The father got off to go to the office. The son backed the lorry to get it into position and unfortunately ran into his father and injured him. The reason was partly because the engine was defective, so that the son had to keep it going fast and, therefore, reversed more quickly than he need have done: partly because the son did not take sufficient steps to see that all was clear: partly because the father did not keep a proper look out. The father sued the Cold Storage Company for damages for negligence. The case was tried by McNair J. on January 29, 1953. He found that the father was one-third to blame and the company two-thirds. He assessed the total damages for the injuries at £2,400 and gave judgment for the father for £1,600 and costs.

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* It is regretted that, owing to the illness of the reporter present at the hearing, it is not possible to present the arguments.

[3] [1943] 2 K.B. 139; 59 T.L.R. 123; [1942] 2 All E.R. 624.

[4] (1929) 98 L.J.K.B. 308.

[5] [1938] 3 All E.R. 517.

[6] [1949] 2 K.B. 208; 65 T.L.R. 318; [1949] 2 All E.R. 27.

[7] [1935] 2 K.B. 174; 51 T.L.R. 405.

[8] [1951] A.C. 601; [1951] 2 T.L.R. 137; [1951] 2 All E.R. 448.

[9] [1955] 1 W.L.R. 488; [1955] 1 All E.R. 607.

[10] [1937] A.C. 773; 53 T.L.R. 799; [1937] 2 All E.R. 79.

[11] (1874) L.R. 9 Ch. 483.

[12] [1922] 2 K.B. 249; 38 T.L.R. 690.

[13] 1932 S.C.(J.) 13.

[14] [1941] 1 K.B. 198.

[15] [1953] A.C. 663; [1953] 2 All E.R. 478.

[16] [1954] A.C. 427; [1954] 1 All E.R. 546.

The Cold Storage Company were insured against this liability and the insurers have paid the father the £1,600 and costs. Now the insurers seek to recover that sum from the son. To do this they have brought an action in the name of the Cold Storage Company against the son. The Cold Storage Company are, of course, only nominal plaintiffs. The managing director of the Cold Storage Company came to the court and gave evidence. He said that the company were not consulted about this action. The insurers bring it under their right of subrogation or under the clause in the policy authorizing them to use the name of the company.

There can be little doubt that this action was a surprise both to the Cold Storage Company and to the son. Mr. Lister junior is now 33 and he has been employed by the company ever since he was 16. When he was 17 the directors asked him to take a driving test, and, after he had passed it, they asked him to drive the company's lorries. He has driven for them ever since, except when he was away on war service. The company have never suggested to him that he ought to insure himself. He took it for granted that he was fully covered by his employers. The managing director evidently thought the same. He was subpoenaed to give evidence on the son's behalf. He said that it never occurred to him that the company's motor drivers would be personally responsible: and he never suggested to them that they should cover themselves separately. The parties to this action are clearly of one mind about it, but the insurers think differently. They want the son to indemnify them out of his own pocket.

Let me put aside for the moment the question of insurance and treat the case as if the Cold Storage Company were the real plaintiffs. Even so, there was until very recently never a case of this kind recorded in our books. Many a master has been made responsible for the mistakes of his servants, but never has he sought to get contribution or indemnity from his servants. One obvious reason is that it is not worth while. The master is not allowed to make any deduction from his servant's wages: and it would seem the extreme of harshness to seize his savings or to make him bankrupt. The other reason is no doubt the reluctance of a good master to visit the risk of accidents on to his servants. The risk should be borne by the undertaking as a whole rather than by the servant who happens to make a mistake, especially when he is working his master's machine. The master takes the profits from using the machine and should bear the responsibility for the damage it does, even though the damage would not happen without some human error. It seems that these reasons no longer commend themselves to employers, or rather to their insurers, and we have to consider whether the claim is good in law.

At the outset Mr. Christopher Shawcross, for the son, took a preliminary objection to the proceedings. He pointed out that when the Cold Storage Company were sued by the father, if they wished to claim indemnity from the son, the appropriate way for them to do it would have been to issue a third party notice against the son. The judge could then in the one action have assessed the share of responsibility which attached to the father, the son and the company respectively. But instead of issuing a third party notice the company proceeded by means of a separate writ against the son: and they issued this writ, it is said, a week too soon. They issued it before the action against them was tried and before they were found liable themselves. They issued their writ against the son on January 23, 1953, but they were not found liable to the father until January 29, 1953. Mr. Shawcross argued that on this account the action was premature. The Cold Storage Company ought, he said, to have waited until they had actually been found liable to the father and then to have brought their action against the son.

At the hearing before this court everyone agreed that it was undesirable that the substantive claim should go off on a technical point of this kind. We therefore gave leave for a second action to be brought and consolidated with the first action, the pleadings and evidence in the first action to stand as if they had taken place in the second action. This was done, and we are able to deal with the merits of the case. Nevertheless, we still have to decide the preliminary point, because many costs depend upon it.

In order to decide this point, and indeed the other points in the case, it is necessary to decide what is the true basis of an action like this by a master against his servant. Is it an action of contract, or of tort, or is it only given by statute?

So far as contract is concerned it is not suggested that the servant ever agreed to indemnify his master, either expressly or impliedly, against this liability—he never agreed to any such thing—but it is suggested that the servant impliedly agreed to use reasonable care: and that an action lies by the master for breach of that contract. This is a possible way of formulating the claim. Indeed, I suggested it myself in *Jones* v. *Manchester Corporation*,[1] but, on reconsideration, I do not think it is the correct way, for the simple reason that it does not truly represent the facts. When a man holds himself out as a skilled man he thereby impliedly warrants that he is competent at his work, see *Harmer* v. *Cornelius*,[2] but he does not *warrant* that he will use reasonable care. That would be equivalent, in many cases, to a warranty that he will never make a mistake and I know of no case where it has been so held. If a lorry driver has an accident owing to a moment's inadvertence or a slight error of judgment, and a third person is injured, his employer must pay damages. The law imposes a very high standard of care in such cases. But it is going much too far to say that the driver is thereby in breach of a contract with his employer. No man, if asked, would give a warranty to his employer that he would at all times, without exception, come up to the standard of the reasonable man of the law who, so far as I know, when he is driving, never makes a slip or a mistake. The ordinary man would say "I will do my "best; I cannot do more"; and that could hardly be said to be a contract by him. It would not be intended to create legal relations.

Take the converse case, where a servant is injured by the negligence of his employer; for instance, the father's claim against the Cold Storage Company. The liability of the employer is always regarded as a liability in tort, not in contract. The history of this subject shows the courts gradually putting a heavier liability on the master: and they have done it by developing the law, not by altering the contract. If you read through the whole of *Wilsons & Clyde Coal Co. Ltd.* v. *English*,[3] you will not find a word to suggest that the employer's liability nowadays rests on an implied term in the contract. The obligation of the employer is an obligation imposed by the law. It arises out of the relationship of master and servant, not out of any implied promise to use reasonable care. The defences open to the master, too, contributory negligence and so forth, are all regulated by the law and not by the contract. The employer was at one time given the defence of common employment on the supposition of a contract, but that fiction has now been abolished. It bedevilled the law long enough and should serve as a warning not to imply promises contrary to the fact. If there is no implied promise of care by master to servant, so also there is none by servant to master.

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[1] [1952] 2 Q.B. 852; [1952] 1 T.L.R. 1589; [1952] 2 All E.R. 125.

[2] (1858) 5 C.B.N.S. 236.

Another objection to the implied contract is that it would mean that the master could sue his servant for negligence although the master suffered no damage. That cannot be right. It is trite knowledge that an action for breach of contract lies without proof of damage, whereas in the tort of negligence damage is essential. Test the position by taking the simple case where a servant negligently injures his master's person or property. Suppose, for instance, that a domestic servant carelessly breaks a plate whilst she is washing up the dinner things; or a chauffeur by his negligent driving injures his master, who is riding in the car. The master in each case can claim damages for negligence; see *Digby* v. *General Accident Fire and Life Assurance Corporation Ltd.*[4]; but damage is, I think, the gist of the action. If the domestic servant was careless but broke nothing, the master would have no cause of action. If the chauffeur inadvertently failed to keep a good look out, but there was no accident, the master could not sue him for damages. He would not even be able to dismiss him, because it is not every piece of carelessness which justifies dismissal. There must be something gross or persistent about it before it will amount to misconduct such as to justify dismissal.

All this leads me to think that the action against a servant must be founded on tort; and when you turn to the books you will find that there are many authorities, old and new, which go to support this view. In 1534 FitzHerbert, in his New Natura Brevium 94D, said that "if a smith prick my horse with a nail ". . . I shall have my action upon the case against him, "without any warranty by the smith to do it well . . . for it is "the duty of every artificer to exercise his art rightly and truly "as he ought." In 1802, in *Govett* v. *Radnidge*,[5] where the defendant undertook to load a hogshead of treacle on a cart, but, in doing so, negligently broke it open, Lord Ellenborough said that the action was founded "on neglect of duty and not upon "breach of promise." In 1895, in *Taylor* v. *Manchester, Sheffield and Lincolnshire Railway Co. Ltd.*,[6] where a passenger was injured by the negligence of the railway company who were carrying him under contract, it was held that the action was founded on tort. In 1952, in *Jackson* v. *Mayfair Window Cleaning Co. Ltd.*,[7] where cleaners were cleaning a chandelier under contract with the owner, but carelessly broke it, Barry J. held that the owner's claim was founded on tort and not on contract. Those were cases where the negligence occurred in carrying out a contract for services. All the more so when it occurs in a contract of service. I am aware that an action for negligence against a solicitor is founded on contract (see *Groom* v. *Crocker*[8]), but that is very different, because there is no physical damage and the duty arises out of contract only: see *Candler* v. *Crane, Christmas & Co.*[9]

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[3] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628.

[4] [1943] A.C. 121; 58 T.L.R. 375; [1942] 2 All E.R. 319.

Now take the case where the servant's negligence does not injure the master himself, but a third person. If the master is sued by the third person and found liable, the master's claim against the servant does not properly lie in contract in this case any more than it does in the other. Indeed, in the one case where it was suggested that the master might have a remedy, it was put by Warrington L.J. upon a breach of duty by the servant, not upon a breach of contract: see *Weld-Blundell* v. *Stephens*.[10] Here again, test the position by seeing whether damage is an essential ingredient. Can the master sue the servant before any claim is made upon him or before he knows that he is liable to the third person? I think not. Take the facts of this very case, but suppose that it had happened before

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[5] (1802) 3 East 62.

[6] [1895] 1 Q.B. 134; 11 T.L.R. 27.

[7] [1952] 1 T.L.R. 175; [1952] 1 All E.R. 215.

[8] [1939] 1 K.B. 194, 205; 54 T.L.R. 861; [1938] 2 All E.R. 394.

[9] [1951] 2 K.B. 164, 186–195; [1951] 1 T.L.R. 371; [1951] 1 All E.R. 426.

[10] [1919] 1 K.B. 520; 35 T.L.R. 245.

1945. Under the law as it then existed the father would have had no claim against the Cold Storage Company at all. He would have been defeated by his own contributory negligence and by the doctrine of common employment. Can anyone suppose that at common law the Cold Storage Company could have sued the son for negligence when the company were under no liability themselves? Clearly not. Damage must be the gist of the action here, too. This shows that the action does not lie in contract, but, if it lies at all, it is in tort.

So far as tort is concerned, I find it difficult to see how the law of tort can give an indemnity to the master. The master is made liable for a tort. Can he sue his servant for the self same tort? The common law regards the master as a tortfeasor: see *The Koursk*,[11] *per* Scrutton L.J. The case comes within the rule that there is no contribution between tortfeasors. There is, of course, an exception which permits an innocent person to claim contribution or indemnity, but that exception only applies where the innocent person can rely on a contract for contribution or indemnity, express or implied. The master has no such contract. I do not think, therefore, that the common law would have permitted the master to sue in tort.

So far as statute is concerned, however, it is clear that the master has a remedy. By section 6 of the Act of 1935 Parliament has given the master a right to contribution or indemnity from his servant whenever it is just and equitable that he should have it. A master is clearly a tortfeasor within that section. In every case where the owner of a vehicle which is driven by a servant claims contribution from another vehicle he claims as a tortfeasor, because it is only to a " tortfeasor " that the right to contribution is given.

It is significant that the only cases in the books in which a remedy has been given are cases under the statute. There is no recorded case where a master has sued his servant at common law for contribution or indemnity. But even supposing that there was a remedy at common law, I do not think it can survive the Act of 1935. That Act covered the ground so fully that it cannot be supposed that Parliament intended that a separate and distinct remedy should still remain at common law. Are we now, I would ask, to set about the task of defining a remedy which has never been defined before in the whole 800 years of the common law? It would, I suggest, be a work of supererogation to embark on such a task. When Parliament has stated the principle to be applied in a given situation, the lawyers should not proceed to write another one of their own.

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[11] [1924] P. 140; 40 T.L.R. 399.

In the result I adhere to the view which I stated in *Jones* v. *Manchester Corporation*[12] that "In the absence of an express "contract on the matter, the master has no right at law to an "indemnity or contribution from his servant. It is entirely a "matter for the discretion of the court under the Act of 1935 "whether it should order any, and, if so, what contribution or "indemnity between them."

If this is right, it means that the preliminary point succeeds. It has been decided that under the statute a master's claim does not arise until his liability is ascertained by judgment or admission (see *George Wimpey & Co. Ltd.* v. *British Overseas Airways Corporation*[13]), and even if he had a claim at common law it likewise does not arise until he has suffered damage.

I turn, therefore, to the merits of the case. Under the statute, if there had not been any insurance questions involved, the task of the court would have been comparatively simple, namely, to find out what would be just and equitable as between master and servant having regard to the extent of their respective responsibility for the damage and to order the son to pay his proper share: see section 6 (2) of the Act of 1935. But this case is much complicated by the insurance factor.

The Cold Storage Company were insured under two policies. First, they were insured against liability to their employees under an employers' liability policy. Secondly, they were insured against liability for motor accidents under a motor-vehicle policy which enured for the benefit of themselves and their drivers, but it did not cover liability to their employees. The father's claim was clearly covered by the employers' liability policy. The insurers have paid under that policy and are the real plaintiffs in the action.

Mr. Patrick O'Connor invited us to ignore this question of insurance, but I do not think we should blind ourselves in this way. It is undoubtedly true as a general rule that the court is not concerned with the fact that the plaintiff is insured or that he has been paid by his insurance company. That has been so ever since the days of Lord Mansfield; but it is equally true that the insurers who stand behind the action take their plaintiff as they find him, and if he is, for some reason or other, debarred from making a claim, they fall with him. See *Simpson* v. *Thomson*.[14]

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[12] [1952] 2 Q.B. 852, 870.

[13] [1955] A.C. 169; [1954] 3 All E.R. 661; sub nom. *Littlewood* v. *George Wimpey & Co. Ltd.* [1953] 2 Q.B. 501; [1953] 2 All E.R. 915 (C.A.).

It is one thing to say that, as between strangers, insurance is irrelevant, but quite another thing to say that as between master and servant it is irrelevant. If the master relies on an implied contract to make the servant liable, the servant may well rely on an implied term to exempt himself.

What, I ask, is the position when an insurance company brings an action against a servant, without the employer having any say in the matter? Take this very case, where the insurers issue a writ in the employer's name against the servant without consulting either the employer or the servant beforehand. When the servant receives the writ he will take it to his employer and say "Why are you suing me? Surely you have got the money "from your insurance company. So you cannot sue me." This natural comment between master and man throws a flood of light on the implied understanding of the parties. When the man was taken on, he knew that his employer was insured. If anyone standing by were to ask what was to happen if the servant was involved in an accident, both employer and man would say at once "The insurance company will pay." They would not expect that the man would have to pay out of his own pocket. This shows that there is an implied term in these cases whereby, if the employer is insured, he will not seek to recover contribution or indemnity from the servant. I cannot help thinking that the insurers undertook the risk on the very same understanding. The premium was fixed no doubt on the basis that they would foot the bill themselves. No allowance would be made for the possibility of any contribution being obtained from the Cold Storage Company's servants. Yet, if this action is well founded, it means that in every one of these cases the insurance company can turn round and bring an action in the name of the employer against the servant. Nothing could be more detrimental to good relations between an employer and his servants. Nothing could be further from the contemplation of the parties.

In my opinion, no such action lies. If and in so far as the claim rests in contract, which I dispute, it is defeated by the implied term which I have just mentioned. The implied term which exempts the servant is just as plausible as the implied term which makes him liable. If and in so far as the claim rests on the statute, it comes within the express power of the court "to exempt any person from liability to make contribution." This seems to me to be an appropriate case in which the court should exercise this power. Whichever way it is put, however, I am clearly of opinion that an employer, who has been fully indemnified by his own insurance company, should not be allowed to turn round and sue his servant for a contribution or indemnity. It follows that I do not agree with the decision of *Semtex Ltd.* v. *Gladstone*.[15]

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[14] (1877) 3 App.Cas. 279.

That is sufficient to decide this case; but in case I am wrong on this point, I go on to consider the further argument based on the provisions for compulsory insurance under the Road Traffic Acts. Mr. Christopher Shawcross on behalf of the son said that, under those Acts, the driver should have been insured against liability not only to the public but also to his fellow-servants. It follows, on the one hand, that if the employer did not effect such an insurance, he was guilty of a breach of his duty towards the driver and could not recover in this action; but, on the other hand, if the employer had effected an insurance to cover the driver, the servant would have the benefit of it and the employer could not sue him.

This raises a question of the first importance. It depends on the true interpretation of section 35 (1) of the Road Traffic Act, 1930, which is in these terms: "Subject to the provisions of this "Part of this Act, it shall not be lawful for any person to use, or "to cause or permit any other person to use, a motor vehicle on "a road unless there is in force in relation to the user of the "vehicle by that person or that other person, as the case may "be, such a policy of insurance or such a security in respect of "third-party risks as complies with the requirements of this Part "of this Act." The problem is to apply that section to the various cases which arise when a servant is driving a motor-vehicle belonging to his master. It seems to me that when a master employs a servant to drive his motor-vehicle and the servant drives it in the course of his employment, then the master is using the vehicle and so is the servant. Both of them are using it. In such cases it is important to distinguish between the master's user and the servant's user. So far as the user by the master is concerned, if he can point to an effective policy of insurance which covers the user by him of the vehicle at the material time, then no offence is committed by the master. That was the position in *John T. Ellis Ltd.* v. *Hinds*,[16] when a youth of 16 drove a car for his employers without having a driving licence. The employers were in fact quite innocent people. The youth had deceived them into thinking that he was of age and held a driving licence. Upon examining the insurance policy the court held that the user by the employers was covered by the policy because they did not know that the youth did not hold a driving licence. They were, therefore, not guilty of an offence. But the youth himself was, I think, clearly guilty of an offence under the section. The user of the vehicle by him (as distinct from the user by his employers) was not covered by insurance. He could not escape by relying on their innocent use of the vehicle when his own use of it was guilty.

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[15] [1954] 1 W.L.R. 945; [1954] 2 All E.R. 206.

Next take the case where a servant is driving a car on a frolic of his own outside the course of his employment. In that case the servant is using the car but the master is not using it; nor is the master causing or permitting it to be used. The master is not caught by section 35 (1) at all. He is not bound to have a policy covering such user: see the observations of Lord Goddard C.J. in *Ellis* v. *Hinds*,[16] when commenting on *Sutch* v. *Burns*.[17] The driver is, however, caught by section 35 (1) because he is a person using the car and his user ought to be covered by insurance. He is guilty of an offence unless he has taken out a policy covering his user, which he will not usually have done. The injured party will not suffer, however, because it is a case where the Act requires the liability to be covered by insurance and, as such, the Motor Insurers' Bureau will pay the injured party just as if the driver had taken out a policy as he ought to have done.

The present case is the difficult one when a servant injures a fellow-servant. Suppose that a servant, whilst driving in the course of his employment, runs down a fellow-servant in the road. In that case the master is using the vehicle and so is the servant. Both are using it. But the effect of the section is different for each. We must consider the master's user separately from the servant's user. (1) The master's user. So far as the master's user is concerned, he is not bound to have a motor policy which covers injury to his own employees: see section 36 (1) (*b*) (i) of the Act. The reason is, no doubt, because his responsibility to his own employees is discharged by his contribution to the National Insurance Fund or by his employers' liability policy. (2) The servant's user. So far as the servant's user is concerned, there must, I think, be a policy in force which covers him in case of injury to his fellow-servants. The section says that it is not lawful for him to use a motor-vehicle on the road unless there is in force, in relation to the user by him, such a policy of insurance against third party risks as complies with the Act. When you are considering the user by him, the fact that he is a servant is irrelevant. His user must be covered just the same as if he were not a servant. The policy must cover his user of the vehicle, no matter whom he runs down. It makes no difference that he runs down a fellow-servant. He must be covered for that risk. (3) The master's causing or permitting. The section also makes it an offence to " cause or permit any " other person " to use a motor-vehicle on the road unless there is in force, in relation to the user by that person, such a policy of insurance as complies with the Act. When that section is applied to the use by a servant, it is plain that a master must not cause or permit his servant to use the lorry unless there is in force, in relation to the servant's user, a policy which complies with the Act; that is, a policy such as I have described under (2) above, which covers injuries to his fellow-servants. This means that an employer's motor policy, in order to comply with the Act, should be extended so as to cover cases where his servants, whilst driving in the course of their employment, cause injuries to others, including their fellow-servants.

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[16] [1947] K.B. 475, 485; 63 T.L.R. 181; [1947] 1 All E.R. 337

[17] 60 T.L.R. 1; [1943] 2 All E.R. 441.

I appreciate that in *Lees* v. *Motor Insurers' Bureau*[18] Lord Goddard C.J. held that a servant need not be covered for injury to his fellow-servants: but he seems to have approached the case on the footing that, in such a case, there was only user by one person, namely, the master, and that, so long as there was a policy in force in relation to the master's user, the Act was satisfied. I am quite clear, however, that, in addition to the user by the master, there is at the same time a user by the servant. Under the Act there must be a policy in force in relation to the servant's user also, and this must cover fellow-servants. The authority of *Lees* v. *Motor Insurers' Bureau* is greatly impaired by the fact that, when an appeal was brought to this court, the bureau did not resist it, but preferred to pay the widow her full claim and costs.[19] I do not think that the decision in *Lees* v. *Motor Insurers' Bureau* was correct.

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[18] [1952] 2 T.L.R. 356; [1952] 2 All E.R. 511; [1952] W.N. 409.

[19] [1953] 1 W.L.R. 620.

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What is then the position? When the Cold Storage Co. sent the son out with his lorry, they ought to have seen that there was in force a policy which covered his user of it in respect of claims by anyone, including his fellow-servants. The Act required that the son should be insured against this very risk. It would have been unlawful for the Cold Storage Co. to send him out uncovered. It was a necessary implication in his contract of employment that the company would not ask him to do anything unlawful, and thus it was implied that the company would see that his user was covered by insurance: see *Gregory* v. *Ford.*[20] That means that he would not be called upon personally to pay.

I do not stop to consider whether the Romford Cold Storage Co. did fulfil their obligation in this case. There is much to be said for the view that the motor policy did cover their servants in respect of injuries to fellow-servants. The wording of the policy is ambiguous, but it might well be construed so as to give the cover which the company were bound in law to effect. See *Richards* v. *Cox.*[21] But whether the motor policy did or did not cover the son, the Cold Storage Co. cannot claim an indemnity against the son when they were under an obligation to see that he was covered.

Mr. Patrick O'Connor submitted, however, that all this discussion about the Road Traffic Act was beside the mark, because this particular accident did not occur on a road but in a yard. I do not think that it can be put on one side in this fashion. Mr. Christopher Shawcross gave, I think, the correct answer when he pointed out that, in order to comply with the Act, the motor policy had to cover "injury to any person caused by or arising "out of the user of the vehicle on a road": see section 36 (1) (*b*). The injury to the father was not caused by the use of the lorry on a road, but it did, I think, arise out of it. The lorry was used for transport on roads and, in the ordinary course of its work, it had to pull into yards and forecourts, and so forth, so as to load and unload. Many accidents may occur whilst so doing. It would be very strange if there was no obligation to insure the lorry during these incidental operations. If an accident happened whilst it was backing from a public road into a private drive, so as to turn, the injury would clearly arise out of the use of the vehicle on a road. So, also, if it is backing from a main road into a private yard so as to load or unload; and that is this case. I agree that if the lorry was being used for something unconnected with road transport, as, for instance, if it was taking fodder to animals across a field, or if it had been in the yard a week and was not being used outside, there would be no need to insure it. But when it is engaged in operations incidental or ancillary to a journey on a road, then any injury during those operations arises, I think, out of the use of the vehicle on a road and must be covered by insurance. It seems that the insurance companies accept this view, because I notice that all motor policies in common form cover the use of motor-vehicles anywhere, not only on a road, but also in a yard or elsewhere. Any other view would make a deplorable gap in our system of compulsory insurance.

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[20] [1951] 1 All E.R. 121.

[21] [1943] 2 K.B. 139; 59 T.L.R. 123; [1942] 2 All E.R. 624.

My conclusion is that the employers in this case were bound under the Act to insure the son in regard to this injury to the father, and being so bound they cannot claim indemnity from the son now. In my opinion the appeal should be allowed; in the first action on the ground that it was premature; in the second action (1) on the ground that a master, who has himself recovered indemnity from his insurers, cannot go on to recover indemnity from his servants; (2) on the ground that under the Road Traffic Act the company were bound to insure the son against this injury to his father.

BIRKETT L.J. I have come to a different conclusion than the one expressed in the judgment of my Lord to which we have just listened, and it is scarcely necessary to say that I differ from him with diffidence and regret.

This appeal raises some questions of great interest and great difficulty. The defendant Lister and his father were both employed by the plaintiff company. On January 25, 1949, the defendant Lister drove a Bedford lorry belonging to the plaintiff company into the yard of a slaughterhouse off the Romford Road, in order to collect some material for the plaintiff company. The defendant's father accompanied him as a part of his duty with the plaintiff company and, whilst the son was backing the lorry, he ran into and injured the father.

On January 29, 1953, McNair J. awarded the father £1,600 damages and costs against the plaintiff company because of the negligence of the son, but found the father one-third to blame. The plaintiff company had two policies of insurance which are material to this appeal, the first being an employer's liability policy covering them for personal injuries to their servants arising out of the employment; and quite clearly the liability to the father was covered by this policy. The second policy was a

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motor-vehicle policy which covered the plaintiff company for all sums they might become liable to pay for death or bodily injury to any person, caused by or arising out of the use of the vehicle, but excluding persons in the employment of the plaintiff company; but an extension was made in the case of a person in the employment of the plaintiff company who was driving the vehicle for the purposes of the plaintiff company. This extension covered the defendant Lister if he was injured when driving the lorry, but it is contended that it did not avail to cover him for liability to fellow servants injured by his default.

On January 23, 1953, some six days before the trial of the father's action, a writ was issued in the name of the plaintiff company claiming an indemnity or contribution from the son for any damages the plaintiff company might have to pay to the father because of the son's negligence.

Now, by condition 2 of the Lloyd's employer's liability policy, the underwriters were allowed "to prosecute in the name of "the assured for their own benefit any claim for indemnity or "damages or otherwise, and shall have full discretion in the con"duct of any proceedings, and in the settlement of any claim, "and the assured shall give all such information and assistance "as the underwriters may require." It was by virtue of this clause that the writ was issued, and it was issued without consultation with the plaintiff company. I do not think it adds anything to the solution of the legal problems in the present appeal, but a word or two perhaps might be said on what is a somewhat unusual state of affairs. By entering into a policy of the kind we are considering, containing the condition which I have recited, the master delivers himself into the hands of the underwriters completely. His servant may have been in his employment for many years and rendered him loyal and devoted service; yet if he were to be found guilty of negligence, for which the master was in law responsible, and the underwriters had paid the damages under the master's policy, the underwriters could sue the servant in the master's name, although the master himself would never have dreamt of doing so; and the underwriters could recover damages which might conceivably ruin the servant completely. The underwriters would then have received the premium on the policy from the master, and the damages they had paid on the master's behalf from the servant. I cannot but think that, when the premium on the policy was fixed, it was fixed without any thought of obtaining damages from the servant. This view receives some support from the fact that until recently no such action as the present one appears in the Law Reports.

In *Semtex Ltd.* v. *Gladstone* [22] Finnemore J. dealt with the case of a servant being sued by his master, and referred to the earlier case of *Digby* v. *General Accident Fire and Life Assurance Corporation Ltd.*,[23] where Miss Merle Oberon, the actress, sued her own chauffeur and recovered £5,000 damages against him. The House of Lords decided in that case that the policy of insurance taken out by Miss Oberon protected the chauffeur also; but the right of the master to sue the servant was not doubted. In *Semtex Ltd.* v. *Gladstone* Finnemore J. said [24]: "The next "question is whether the master can sue the servant if the servant "has not directly injured the master, or his property, but having "injured other people in such a way that his master is called "upon, as being responsible for the torts of the servant, to pay "large sums of money. The principle, which I believe to be the "true principle, is summarized in Salmond on the Law of Torts, "11th ed., p. 92: 'It would seem clear on principle that in all "'cases of true vicarious liability the person held vicariously "'liable for the tort of another should have a right of indemnity "'as against that other. Thus, a master who has paid for the "'negligence of his servant should be able to sue that servant "'for indemnity. That this is generally so cannot be doubted, "'provided that the negligence of the employer himself or one "'of his other servants has not contributed to the damage.'"

When the first writ in this action was issued and served it is agreed that the underwriters had paid nothing under the policy. It was submitted that that fact disables them from exercising their rights of subrogation; but condition 2 of the policy, which I have recited, gives to the underwriters a contractual right as there set out, and in those circumstances the underwriters do not need to rely on their rights, other than the contractual rights under the policy.

In so far as the claim was made under the Law Reform (Married Women and Tortfeasors) Act, 1935, *Wimpey's* case [25] decided that the claim of the plaintiff company under that Act could not arise until they had either admitted their liability or been found liable. When the appeal first came before this court it was felt desirable to allow a second action to be brought and consolidated with the first action, so that the appeal should not be decided on a mere preliminary technical point. In view of the decision in *Wimpey's* case,[26] I am of opinion that the writ in the first action was premature in so far as the writ was based on the Act of 1935. But perhaps the most important question in the case is whether the claim of the plaintiff company as set out in paragraphs 8 and 9 of the statement of claim can be sustained. That is a claim for damages for breach of contract based upon the implied term in the contract of service made between the plaintiff company and the defendant, that the defendant would drive the plaintiff company's lorries with reasonable care and skill. If that claim can be sustained, then the claim cannot be dismissed as premature, because the breach of contract alleged took place on January 26, 1949. But can the claim be sustained?

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[22] [1954] 1 W.L.R. 945; [1954] 2 All E.R. 206.

[23] [1943] A.C. 121.

[24] [1954] 1 W.L.R. 945, 948; [1954] 2 All E.R. 206, 207.

[25] [1953] 2 Q.B. 501; [1955] A.C. 169.

It is submitted that the plaintiff company and the defendant are to be regarded as joint tortfeasors in law, and, apart from statute, there can be no contribution between joint tortfeasors. In *Semtex Ltd.* v. *Gladstone* Finnemore J. said [27]: "For some "reason that I have never been quite able to understand, the "master who is vicariously responsible for his servant is referred "to as, and apparently treated as, a joint tortfeasor. . . . I could "never see why an employer, whose only liability is the vicarious "liability of being responsible for what his servant does, should "be called a joint tortfeasor, which should mean a person who "took some part in the tort which is the subject of the action."

In *The Koursk* [28] Scrutton L.J. said: "The substantial "question in the present case is: What is meant by 'joint tort"'feasors'? and one way of answering it is: 'Is the cause of "'action against them the same?' Certain classes of persons "seem clearly to be 'joint tortfeasors': the agent who commits "a tort within the scope of his employment for his principal, "and the principal; the servant who commits a tort in the course "of his employment, and his master. . . . These seem clearly "joint tortfeasors; there is one tort committed by one of them on "behalf of, or in concert with another." Sargant L.J. said [29]: "And the discussion in Salmond on Torts, 5th ed., p. 84, is to "much the same effect. Stress is laid there on the feature that "there must be responsibility for the same action, the imputation "by the law of the commission of the same wrongful act to two "or more persons at once. The examples given are under three

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[26] [1955] A.C. 169.

[27] [1954] 1 W.L.R. 945, 949; [1954] 2 All E.R. 206, 208.

[28] [1924] P. 140, 155; 40 T.L.R. 399.

[29] [1924] P. 140, 159.

"heads: agency, vicarious liability and common action." It is true that in the eleventh edition of Salmond on Torts, at p. 92, there is not only a difference from the fifth edition, but also from the tenth edition as quoted by Singleton L.J. in *Jones* v. *Manchester Corporation.*[30]

In the pleadings in the present action the plaintiff company pleaded that it was an implied term of the contract between the company and the defendant that the defendant should carry out his duties with reasonable care and skill and that he did not do so, and in consequence the plaintiff company suffered damage; and in the alternative they claimed damages from the defendant for negligence or breach of contract. This was the ground which appealed to Hodson L.J. in *Jones* v. *Manchester Corporation,*[30] and to Finnemore J. in *Semtex Ltd.* v. *Gladstone.*[31] The damages would be the £1,600 and the costs the plaintiff company had been ordered to pay to the father, and this would in fact be an indemnity paid by one joint tortfeasor to another, whatever name was given to it. The question is: is that permissible?

Merryweather v. *Nixan*[32] in 1799 appeared to have decided that one joint tortfeasor could not get either an indemnity for the whole or contribution for any part of any sums he had paid if he had been sued to judgment alone. The note on p. 172 of Sir Percy Winfield's "The Law of Tort," 5th ed., reads: "(1799) "8 T.R. 186: a decision of Lord Kenyon, C.J., which was much "criticized later"—this is speaking of *Merryweather* v. *Nixan*[33] —"both in and out of the courts, but mainly because the Chief "Justice was regarded as having decided that there *never* can "be contribution among joint tortfeasors, although he certainly "did not go so far as that. In 1894, the House of Lords thought "that it was too late to uproot the rule from English law, though "they refused to force it upon Scots law, Lord Herschell, L.C., "regarding it as destitute of any principle of justice, or equity, "or even of public policy."

The language of Lord Herschell is taken from *Palmer* v. *Wick and Pulteneytown Steam Shipping Co. Ltd.*[34]: "Much reliance "was placed by the learned counsel for the appellant upon the "judgment in the English case of *Merryweather* v. *Nixan*. The "reasons to be found in Lord Kenyon's judgment, so far as "reported, are somewhat meagre, and the statement of the facts "of the case is not less so. It is now too late to question that

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[30] [1952] 2 Q.B. 852, 865.

[31] [1954] 1 W.L.R. 945.

[32] (1799) 8 T.R. 186.

[33] Ibid.

[34] [1894] A.C. 318, 324; 10 T.L.R. 511.

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"decision in this country; but when I am asked to hold it to be "part of the law of Scotland, I am bound to say that it does not "appear to me to be founded on any principle of justice or equity, "or even of public policy, which justifies its extension to the "jurisprudence of other countries. There has certainly been a "tendency to limit its application even in England. In the case "of *Adamson* v. *Jarvis* [35] Best, C.J., in delivering the judgment "of the court, referred to the case of *Philips* v. *Biggs*,[36] which he "said was never decided; 'but the Court of Chancery seemed to "'consider the case of two sheriffs of Middlesex, where one had "'paid the damages in an action for an escape, and sued the "'other for contribution, as like the case of two joint obligors.' "He then proceeded as follows: 'From the inclination of the "'court in this last case, and from the concluding part of Lord "'Kenyon's judgment in *Merryweather* v. *Nixan*, and from "'reason, justice, and sound policy, the rule that wrongdoers "'cannot have redress or contribution against each other is "'confined to cases where the person seeking redress must be "'presumed to have known that he was doing an unlawful act.' "If the view thus expressed by the Court of Common Pleas be "correct (and I see no reason to dissent from it), the doctrine "that one tortfeasor cannot recover from another is inapplicable "to a case like that now under consideration." The severity of the criticism is largely due to the belief that Lord Kenyon was asserting that in no circumstances whatever could there be any contribution between joint tortfeasors, which now appears to have been a misreading of his judgment. It seems fairly clear also that the rule as laid down by Lord Kenyon was the application to the facts of the much wider rule, that if an act is manifestly unlawful, or the doer of the act knows it to be unlawful, he cannot maintain an action for contribution to or indemnity against his liability arising therefrom. The plaintiff company in this case knew nothing of the acts of the defendant; they knew he drove their lorries as the necessities of the business demanded; but the manner in which he drove them was a thing over which they could exercise no control whatever. Save that in law they were to be held vicariously liable for his acts of negligence when driving their lorries, they did not share in the commission of any tort in any real sense of the word. The negligence which resulted in the injury to the father of the defendant was negligence to which the plaintiff company gave neither their authority nor their assent and of which in fact they had no knowledge whatever.

[35] (1827) 4 Bing. 66.

[36] (1659) Hard. 164.

So long ago as 1827, Best C.J., in *Adamson* v. *Jarvis*,[37] said that the rule in *Merryweather* v. *Nixan*[38] "is confined to cases "where the person seeking redress must be presumed to have "known that he was doing an unlawful act." In *Semtex Ltd.* v. *Gladstone*[39] Finnemore J. said that he preferred Warrington L.J.'s way of looking at the problem, as Warrington L.J. expressed it in *Weld-Blundell* v. *Stephens*.[40] Warrington L.J. said without any qualification that the master could recover from the servant by an action at law. The words of Warrington L.J. were these: ". . . it may well be that if a servant by his negligent act inflicts "an injury on a third person who recovers damages therefor from "the master, the latter may recover the amount from the servant "in an action against him for breach of his duty. But in such a "case the right of action against the master and his legal liability "themselves result from the servant's negligent act, and but for "that act would not have existed." In my opinion, the plaintiff company are not precluded from maintaining their action in this case against the defendant merely because in law they are regarded as joint tortfeasors, so that the third party can sue them as being vicariously responsible for the acts of their servant. This question relating to joint tortfeasors loomed large in the discussion of the rights of the plaintiff company in this case, and I have therefore spent a little time in dealing with it, but the question whether it was competent to the plaintiff company to bring an action founded in contract was scarcely more than mentioned. I have had the advantage of reading the judgment of Romer L.J. on this point and have considered the cases which are there cited by him in his judgment, and as I agree with his judgment I do not add further words of my own on this point. In my judgment, it was perfectly competent to the plaintiff company to sue their servant for breach of the contract of service.

Several other points were raised in argument and I can deal with them with brevity. I find it impossible to hold that there was an implied term in the contract of service between the plaintiff company and the defendant to the effect that, if the master was fully insured and recovered the amount that he had had to pay because of the servant's negligence, the master would not seek to recover from the servant. I do not think that any such consideration entered their minds. This action is brought by Lloyd's underwriters in the name of the plaintiff company who, because of condition 2 in the policy, have no say whatever in the matter.

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[37] 4 Bing. 66.

[38] 8 T.R. 186.

[39] [1954] 1 W.L.R. 945.

[40] [1919] 1 K.B. 520, 536.

Left to themselves, I do not think the action would ever have been brought.

Some extremely interesting arguments were submitted on the construction of section 35 of the Road Traffic Act of 1930. The Act became relevant and important in this way: it was submitted that it was an implied term of the contract of service that the defendant should not be required to act unlawfully, and that he should not be asked to drive the lorries for the plaintiff company unless he was covered by insurance giving him the indemnity required by section 36 (1) of the Road Traffic Act of 1930. The defendant says that he should have been covered in respect of the bodily injury caused to any person by or arising out of the use of the vehicle on a road. "Road" is defined in the Act as meaning any highway and any other road to which the public has access. I confess that this point has caused me great trouble. Is the drive to a private house a road to which the public has access? Tradesmen's vans, postmen on cycles or in cars, the servants of the local authority dealing with gas, electricity and water, and various other people use the drive, and they are members of the public with access to the road. No great reliance was placed on this aspect of the case, that this yard was a road within the meaning of section 121 of the Road Traffic Act, 1930, but it was submitted that the injuries to the father of the defendant were not "caused by" the use of the vehicle on the road, but they "arose out of" the use of the vehicle on a road within the meaning of the Act. Put in its crudest form, the argument seems to be that because it was impossible for the lorry to get to the yard where the accident took place without using a road, therefore the accident in the yard "arose out of" the earlier use of the lorry on the road.

It appears from the evidence of the father of the defendant, given before Ormerod J., that the father and son went twice a day to this yard on the business of the company, driving down the Romford Road and turning off that road into the yard. When the accident took place it was conceded that the lorry was not on a road but in the yard, and the negligent backing of the lorry in the yard was the cause of the accident. In the strict use of language, therefore, it is plain that the accident was not "caused "by" the use of a vehicle on the road, nor did it "arise out of" the use of the vehicle on the road. Can it be said that because the vehicle had to be driven along a road to get to the yard, and it was driven along without any accident, but an accident occurred in the yard, that accident "arose out of" the use of the vehicle on the road, that particular user having ceased when the accident took place? It is true that if the lorry had never been sent on to the Romford Road the accident would never have occurred, and in that limited sense it may be said to have arisen out of the use of the vehicle on the road, the driving into the yard being the purpose for which the lorry made use of the road. I think that the question whether an accident is "caused by" or "arises "out of" the use of a vehicle on a road is a question of fact, and in the present case I take the view that the accident did not arise out of the use of the vehicle on the road. If this view be right, it is not necessary to discuss the interesting and difficult points arising under the application of the Act. My Lord has discussed them with some fullness in his judgment, and they are manifestly of very great importance, but I do not propose to do more on this part of the case than to say that the submission that the slaughterhouse yard where the accident took place was not a "road" is, in my opinion, well founded, that the accident was not caused by, nor did it arise out of, the use of the vehicle on a road, and that the points do not therefore arise for decision in the present case.

I do not think that the damages claimed are too remote; they are the direct consequence of the negligence of the defendant, and were caused by the breach of contract to which I referred earlier in this judgment. I cannot think that because the plaintiff company was insured in this case that that operated as a complete immunity to the defendant from being sued when his own breach of contract had occasioned the damage; and equally I cannot think that there was any implied term of the contract of service which would place upon the plaintiff company the duty of insuring the defendant against liability for injuries such as arose in this case when the defendant's father, a fellow servant, was injured in the way described.

The judge granted the plaintiff company an indemnity under the provisions of the Law Reform (Married Women and Tortfeasors) Act, 1935. Section 6 (2) of the Act of 1935 gives the court power to exempt any person from liability to make contribution, and it is suggested that this is a proper case in which that discretionary power should be exercised. That discretion must, of course, be exercised judicially, and it should be exercised on the facts of the particular case. Ormerod J. said in this case that the defendant was not entitled to anything by way of mitigation because the negligence was the negligence of the defendant. It is difficult to see how he could have come to any other conclusion on the facts, and, in my view, it is not open to us to say that on the facts of this case the defendant should be freed from any liability to make contribution. I think Ormerod J. was right. I have already expressed the diffidence with which I differ from my Lord in a case of some complexity and difficulty; but, giving the case the best consideration I can, I would dismiss both appeals.

ROMER L.J. There is no doubt but that these actions have been brought at the instance of the underwriters to the employer's liability policy which is held by the plaintiff company and that the underwriters have at all times been and still are in control of the actions. This fact has given rise to the first preliminary objection which was taken by the defendant before the judge and which was relied on when the matter came on before us on appeal from the order made in the first action. This objection is that the underwriters are suing by subrogation to the plaintiff company and that they are precluded from doing so by the fact that they had not paid anything to Lister senior at the date when the writ in this action was issued. I will assume that this objection is open to the defendant notwithstanding that the apparent plaintiffs are the Romford Company and that if the action failed the defendant would have no rights whatever against the underwriters, but he would have, against the company, all the rights and remedies which our procedural law gives to a successful defendant against a plaintiff whose action is dismissed with costs. Even so, it does not appear to me that the objection should prevail. The underwriters admittedly had not paid any moneys to Lister senior when these proceedings were instituted, because the liability of the plaintiff company to this employee had not then been established, and accordingly they could not claim to be subrogated to such rights as the plaintiff company possess against the present defendant. It is not, however, necessary for the underwriters to depend in any way on the principle of subrogation because they have a contractual right under the policy itself to sue in the company's name and so far as I know they have brought this action in pursuance of that right and of that alone. In my opinion, therefore, this preliminary objection fails.

The second objection is that the action is premature in that it sought indemnity from the defendant under the Law Reform (Married Women and Tortfeasors) Act, 1935, before the plaintiff company had been held liable to Lister senior in the action which he had brought against them. The writ in the first action was in fact issued a week or so before the elder Lister's action came on for hearing and accordingly, so far as the present proceedings are based upon the Act of 1935, the objection of prematureness must prevail (*Littlewood* v. *George Wimpey & Co. Ltd.*[41]). By their statement of claim, however, the plaintiff company pleaded alternatively that it was an implied term of the defendant's contract of service with the plaintiff company that he should carry out his duties with reasonable care and skill and that they have suffered damage by reason of his failure to do so in the matter of running down his father. If this plea be true in fact and sustainable in law, the action was not, in my opinion, brought prematurely, because the breach of contract arising out of the negligence of the defendant had already occurred. In my judgment, there is little doubt but that the legal implication suggested by the plea is fully warranted. In *Harmer* v. *Cornelius*,[42] Willes J., in delivering the judgment of the court, said: " When a skilled labourer, artizan, or artist is employed, " there is on his part an implied warranty that he is of skill " reasonably competent to the task he undertakes—Spondes " peritiam artis. Thus, if an apothecary, a watch-maker, or an " attorney be employed for reward, they each impliedly under- " take to possess and exercise reasonable skill in their several " arts. . . . An express promise or express representation in " the particular case is not necessary." (See also *Jenkins* v. *Betham*[43] and *Cuckson* v. *Stones*.[44]) In my judgment, the principle enunciated by Willes J. is clearly applicable to the defendant in the present case; for a man who is employed to undertake the responsible work of driving his employers' lorries impliedly promises, in my opinion, as part of his contract of service, that he will drive them with reasonable care and skill. Did, then, the defendant commit a breach of this implied promise? Inasmuch as the judge has found, upon ample material, that the accident to Lister senior was as to two-thirds due to the negligence of the defendant, this question can, in my judgment, only be answered in the affirmative. Prima facie, therefore, it would seem to me that the plaintiff company are entitled to recover damages from the defendant for breach of contract; and the amount of the damages would normally be the totality of damages and costs which they had to pay to Lister senior under the judgment which he obtained against them. It has been suggested, however (and the suggestion has found favour with my Lord, whose judgment I have had the advantage of reading), that the plaintiff company could not sue the defendant for damages in respect of his breach of contract and that their only remedy (if any) was to sue him in tort for negligence. For myself (and I differ from my Lord with natural regret and diffidence) I feel a considerable difficulty in accepting this view. If A makes an agreement (whether express or implied) with B and breaks it, then normally A can be sued by B for such damages as have naturally flowed from the breach; and I can see no reason why B should be deprived of this remedy either on the ground that A is his servant or on the ground that A's promise is of a particular character, namely, to perform his work with reasonable care and skill. In *Harmer* v. *Cornelius* Willes J. said [45]: "Misconduct in a servant is, according to every day's experience, "a justification of a discharge. The failure to afford the requisite "skill which had been expressly or impliedly promised, is a "breach of legal duty, and therefore misconduct." The "legal "duty" to which Willes J. was there referring is referable to, in my judgment, or at all events includes, the contractual obligation with which the judge had been dealing in the earlier part of his judgment, and which was indeed the essence of the judgment. So also, in *Weld-Blundell* v. *Stephens*, Warrington L.J. said [46]: "Again it may well be that if a servant by his negligent "act inflicts an injury on a third person who recovers damages "therefor from the master, the latter may recover the amount "from the servant in an action against him for breach of his "duty." In my opinion, the Lord Justice had in mind and was referring to the duty which the servant owed to his master under his contract of service and not to some duty which the common law imposed upon him. In the recent case of *Jones* v. *Manchester Corporation*,[47] Hodson L.J. founded his judgment upon the view that a master can recover damages from a servant for breach of the servant's implied contract to perform his work with reasonable care and skill. I respectfully concur in this view, which commended itself also to Finnemore J. in *Semtex Ltd.* v. *Gladstone*.[48] It may well be that in most, if not in all, cases the master could alternatively sue his servant for negligence, but for myself I can see no sufficient ground for depriving him of a promisee's ordinary remedy of an action for damages for breach of contract. I cannot but think that to recognize the existence of a contract but to exclude an action founded upon its breach is to introduce an anomaly into our law which is both unwarranted and confusing. It is, of course, true that many a breach of the servant's implied warranty to exercise care and skill would either cause no damage to the master at all or so little damage that the master would overlook it. These considerations, however, are not confined to contracts of service but are common to most agreements and they cannot, as I think, displace the right of the master to sue if the servant's breach occasions him material damage. Subject, therefore, to the point which I will next consider, the plaintiffs were, in my judgment, entitled to found their claim for damages against the defendant in the first action upon his breach of contract.

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[41] [1953] 2 Q.B. 501.

[42] 5 C.B.N.S. 236, 246.

[43] (1855) 15 C.B. 168.

[44] (1858) 1 E. & E. 248, 257.

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[45] 5 C.B.N.S. 236, 247.

[46] [1919] 1 K.B. 520, 536.

[47] [1952] 2 Q.B. 852.

[48] [1954] 1 W.L.R. 945.

It was further submitted, however, that, even so, the plaintiffs' claim cannot succeed because the plaintiffs are co-tortfeasors with the defendant, and tortfeasors cannot have redress or contribution from one another. The first question which arises upon this is whether the plaintiffs ought properly to be regarded as joint tortfeasors with the defendant in the act which resulted in injury to Lister senior. In *Semtex Ltd.* v. *Gladstone* Finnemore J. said [49]: " I could never see why an employer, whose only liability " is the vicarious liability of being responsible for what his servant " does, should be called a joint tortfeasor, which should mean a " person who took some part in the tort which is the subject of " the action." If this question were free of authority I should be glad to adopt this view, which certainly has some appeal to common sense. It has, however, been authoritatively stated more than once (see, for example, the judgment of Scrutton L.J. in *The Koursk* [50]) that a servant who commits a tort within the scope of his employment and the master who employs him are joint tortfeasors in law and I think, therefore, that it must follow that both the plaintiffs and the defendant must be treated as joint tortfeasors in the present case. Does it, however, follow that the plaintiffs are precluded by this consideration from suing the defendant for damages? The general principle which the defendant invokes is certainly supported by venerable authority (see, for example, *Merryweather* v. *Nixan* [51]), but it is not, in my judgment, a rule of universal application and I confess that, for myself, I feel great difficulty in applying it to the circumstances of the present case. Although the plaintiffs were liable in damages to Lister senior for the accident which befell him, they themselves were morally blameless in the matter and their liability to Lister senior arose solely from the fact that they were answerable for the negligence of the defendant himself. In these circumstances it would, in my opinion, be a flaw in our law, and against natural justice, to permit the defendant to rely upon his own wrongful act as a defence to proceedings for breach of contract. I would only accept such a defence as valid under the guidance of compelling authority, but it appears to me that the current of such authority as was brought to our attention upon the point is distinctly the other way. It seems plain from the passage which I have already cited from the judgment of Warrington L.J. in *Weld-Blundell* v. *Stephens*[52] that the Lord Justice thought that a master who has to pay damages to a third party for an injury resulting from his servant's negligence can recover the amount from the servant; and a similar view has been taken in other cases (see, for example, *Green* v. *New River Co.*[53]; *Semtex Ltd.* v. *Gladstone*[54]; and the opinions of Singleton and Hodson L.JJ. in *Jones* v. *Manchester Corporation*[55]). The statement of the law in Salmond on Torts, 11th ed., p. 92, also supports the view that employers can sue for damages caused to them by their servants' negligence notwithstanding their own vicarious liability to the person whom the servant injured. Moreover, Best C.J., in delivering the judgment of the court in *Adamson* v. *Jarvis*, said[56]: "from the concluding part of Lord "Kenyon's judgment in *Merryweather* v. *Nixan*,[57] and from "reason, justice and sound policy, the rule that wrong-doers "cannot have redress or contribution against each other is "confined to cases where the person seeking redress must be "presumed to have known that he was doing an unlawful act," which certainly cannot be presumed of the plaintiffs in the present case in relation to the running down of the elder Lister. I have accordingly come to the conclusion that the plaintiffs' action in the present case, based upon breach of contract, is not defeated by the suggested principle that there can be no contribution between co-tortfeasors.

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[49] [1954] 1 W.L.R. 945, 949.

[50] [1924] P. 140, 155.

[51] 8 T.R. 186.

It was further suggested, however, that even on the assumption that the plaintiffs could sue in contract, the first action was premature in that the writ was issued before the liability of the plaintiffs to the elder Lister had been established and damages awarded against them. It does not appear to me that this contention is sound. If A believes that B has committed a breach of contract, he can sue for damages at once. If he fails to establish a breach of contract by B he would, of course, lose the action. In that event it could be said that the action should never have been brought at all; but, whether the action succeeds or fails, I am unable to see how it could be said that it had been brought too soon merely because A was unable to quantify his damages at the date when he issued his writ or because, when the action came to trial, he recovered no more than nominal damages. I am accordingly of opinion that the second preliminary objection also fails.

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[52] [1919] 1 K.B. 520, 536.

[53] (1792) 4 T.R. 589.

[54] [1954] 1 W.L.R. 945.

[55] [1952] 2 Q.B. 852.

[56] 4 Bing. 66, 72.

[57] 8 T.R. 186.

The next point with which I should like to deal is the defendant's contention based upon the Road Traffic Acts. This contention was formulated in the re-amended defence as follows: "It was an implied term of the defendant's employment that "he should not be required by the plaintiffs to do anything "unlawful and in particular that he should not be required to "drive unless there was in force in relation to his user of the "vehicle such a policy of insurance as would provide him with "the indemnity which section 36 (1) of the Road Traffic Act, "1930, requires." So far as is relevant for present purposes, the policy which is required by that subsection is one which insures the assured in respect of any liability which may be incurred by him in respect of the bodily injury to any person caused by or arising out of the use of a vehicle on a road; and by section 121 "road" is defined as meaning any highway and any other road to which the public has access. The accident to Lister senior occurred in a yard situate within factory premises, and Mr. Shawcross, for the defendant, conceded that there was no evidence to show that the yard was a road within the meaning of this definition. He argued, however, that the accident to Mr. Lister, while not "caused by" the use of a vehicle on a road, "arose out of" such use. From that hypothesis he developed his contention that the accident was one in respect of which third party insurance was required by the Act and that as the plaintiffs had not taken out the necessary policy on the defendant's behalf they caused him to perform an illegal act and are thereby disabled from founding any claim against him on the ground that he performed that act negligently. I am unable to accept the suggestion that the accident to Lister senior "arose "out of" the use of the defendant's lorry on a road. The argument to the contrary is, as I understand it, that the lorry could not have got to the yard if it had not been used on a road for the purpose of getting there and that accordingly the accident in the yard arose out of that use. It appears to me that in order to arrive at this result the language of section 36 (1) has to be stretched beyond permissible limits. An accident is caused by the use of a vehicle on a road if it runs over a pedestrian at a zebra crossing; an accident arises out of the use of a vehicle on a road if it skids off the road and injures a pedestrian who is walking on the pavement. If, however, it can be said that the accident now in question arose out of the use by the lorry of a road for the purpose of getting to the yard, the same thing could, I suppose, have been said if the accident had happened after the lorry had been in the yard for a week. As I say, I cannot accept Mr. Shawcross's contention upon this point, and it follows that the interesting arguments which we heard on the supposition that the plaintiffs were in breach of some duty to the defendant under the Road Traffic Acts does not, in my opinion, arise; and for myself I would prefer to express no opinion upon them.

It was alternatively argued that in any case it was an implied term of the defendant's contract of service with the plaintiffs that they should insure him against liability for injuring a fellow servant even if no such insurance were required by law. This seems to me to be an untenable proposition, for it would result in imposing upon employers an obligation to provide insurance cover for their servants in respect of any negligence by the servants in their work which results in injury to third parties. No authority was cited to support so extensive a proposition and it cannot, in my judgment, be accepted.

If I am right in the conclusions which I have so far expressed, what defences remain open to the claim for damages against the defendant for breach of contract? It was said that the damages claimed are too remote. I do not think they were, for they flowed directly from the defendant's breach of his obligation to carry out his duties with reasonable care and skill. It was alternatively contended that it was an implied term of the defendant's employment that he should not be sued by the plaintiffs for damage arising from his negligence if they are insured in respect of such damage. There is no question but that a man can sue a servant who, by his negligence, causes damage to the master. "An employee is generally as much liable to his "employer if he causes his employer damage by negligence as "is anyone else" (*per* Lord Wright in *Digby* v. *General Accident Fire and Life Assurance Corporation*[58]). I cannot think that

[58] [1943] A.C. 121, 141.

although this liability exists in general it is excluded by implication if the employer is insured. I do not know whether it is suggested that it would still be excluded even if the servant was himself insured. In my opinion, the liability to which Lord Wright referred exists whether the master is insured or not.

On the question generally as to the reluctance with which (so it was suggested) the courts should entertain an action by a master against his servant in respect of damage caused to the employer by the negligence of the servant in relation to third parties, I would venture to make one or two observations. In the accident which led eventually to *Digby's* case,[59] Miss Merle Oberon suffered injuries from the negligent driving of her car by her chauffeur, in respect of which she recovered no less than £5,000 damages against him; and I can see no reason in logic why the law should give an employer redress if the damage which he suffers from his servant's negligence is physical but deny it if the damage is financial. Further, I would again cite a passage from the judgment of Finnemore J. in *Semtex Ltd.* v. *Gladstone*[60] and respectfully adopt it as my own: "That an "employee" he said, "who is negligent and causes grave "damage to his employers, should be heard successfully to say "that he should not make any contribution to the resulting "damage, is a proposition which does not in the least commend "itself to me and I do not see why it should be so. I find that "justice, as we conceive justice in these courts, says that "the person who caused the damage is the person who must in "law be called upon to pay damages arising therefrom." For myself, I agree with these observations of the judge. It is not, in my opinion, in the public interest that workmen should assume that, whoever else may be called upon to compensate the victims of their wrongdoing, they themselves will be immune. I say this for two reasons. First, it is not in accord with contemporary thought that any section of the public should be free from any liability to which the people as a whole are subject. Secondly, such freedom would tend still further to diminish that sense of responsibility which all should feel towards one another, but which can scarcely be regarded as an outstanding characteristic of modern life.

For the reasons which I have stated, I have arrived at the conclusion that the appeal in the first action should be dismissed. In the second action (an appeal by the defendant which was

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[59] [1943] A.C. 121.

[60] [1954] 1 W.L.R. 945, 953.

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by consent treated as being before us) the plaintiffs are also entitled, in my judgment, to succeed upon the same grounds; but in the second action they can also rely, and they do rely, on the Law Reform Act, 1935, s. 6 (2), and, in my judgment, the judge arrived at a right conclusion in granting them an indemnity under the Act on the ground, as stated in his judgment, that "the negligence was the negligence of the defendant and in "those circumstances he is not entitled to anything by way of "mitigation." It follows that for myself I would dismiss the second appeal also.

Appeals dismissed.

Solicitors: *Sidney Torrance & Co.; J. F. Coules & Co.*

F. R. D.

1956
Jan. 12, 13, 16, 23.

Lord Goddard C.J., Stable and Ashworth JJ.

C. A.

1956
Mar. 19, 20, 21, 22.

Singleton, Jenkins and Hodson L.JJ.

BRITISH TRANSPORT COMMISSION *v.* WESTMORLAND COUNTY COUNCIL.
SAME *v.* WORCESTERSHIRE COUNTY COUNCIL.

Railway—Powers—Right of way—Dedication—Footpath over private accommodation bridge—Presumption of dedication by long user by public—Power of railway authority to dedicate—Test to be applied Consistency with purposes of railway—Question of fact—Railway Clauses Consolidation Act, 1845 (8 *&* 9 *Vict. c.* 20), *ss.* 16, 68—*National Parks and Access to the Countryside Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 97), *s.* 31.
Fact or Law.

A footpath across a bridge spanning a railway line constructed in 1847 under powers conferred by the Kendal and Windermere Railway Act, 1845, was marked on a provisional map prepared by a county council pursuant to the National Parks and Access to the Countryside Act, 1949, as a public right of way as at November 1, 1952. The British Transport Commission, the railway owners, applied to quarter sessions under section 31 of the Act for a declaration that no right of way existed over the bridge. Quarter sessions found that the bridge had been constructed solely as a private accommodation bridge for the benefit of the owners and occupiers of the lands on either side of the railway line and severed thereby, and that it had never been expressly dedicated to the public, but that its use by the public over a period of more than 20 years had been such as to raise a presumption that it had

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[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

been dedicated. They found that the continued existence of the bridge would not endanger the running of the trains or the operation of the railway, and held that the footpath had been dedicated. The Divisional Court dismissed an appeal in which it was contended that such dedication would be ultra vires the statutory purposes of the Commission. On appeal:—

Held, that a railway authority could grant an easement of way or dedicate a path to the public use over its land provided that such grant or dedication was not incompatible with the purposes for which the railway had been incorporated, and that that was the only test to be applied in determining whether a grant or dedication was intra or ultra vires. Whether or not a grant or dedication was incompatible with the statutory purposes of the railway authority was a question of fact in each case and as, in the present case, the dedication did not prevent the running of the railway, although it burdened it, it was not ultra vires the statutory powers of the Commission.

Rex v. *Inhabitants of Leake* (1833) 5 B. & Ad. 469; *Birkdale District Electric Supply Co. Ltd.* v. *Southport Corporation* [1926] A.C. 355; 42 T.L.R. 303; *South Eastern Railway Co.* v. *Cooper* [1924] 1 Ch. 211, and *South Eastern Railway Co.* v. *Warr* (1923) 21 L.G.R. 669 applied.

Ayr Harbour Trustees v. *Oswald* (1883) 8 App.Cas. 623 distinguished.

Decision of Divisional Court affirmed.

BRITISH TRANSPORT COMMISSION *v.* WESTMORLAND COUNTY COUNCIL.

CASE STATED by appeals committee of Westmorland County Quarter Sessions.

On November 12, 1954, an application was made by the appellants, the British Transport Commission, pursuant to section 31 of the National Parks and Access to the Countryside Act, 1949, for a declaration that on August 1, 1952, no public right of way existed over a bridge spanning certain lines of railway owned and occupied by them in the Borough of Kendal in the County of Westmorland delineated upon a provisional map prepared by the respondents, the Westmorland County Council, pursuant to the Act and thereupon shown to be crossed by a footpath.

The appeals committee heard the application on April 5, 1955 and found the following facts. The lines of railway were constructed in or about 1847 by the appellants' predecessors in title under powers contained in the Kendal and Windermere Railway Act, 1845 (which incorporated the provisions of the

Railway Clauses Consolidation Act, 1845[1]). At the date of the construction of the railway no public right of way existed on or near the line of the footpath. The bridge was constructed by the appellants' predecessors in title at about the time of the construction of the railway in order to facilitate access between the land on either side of the railway which was severed by the construction of the railway line. It was constructed solely as a private accommodation crossing for the benefit of the owners and occupiers of the lands so severed. No express dedication to the public of the way thereover had at any time been made. Since the construction of the railway members of the public had used the footpath and the bridge in such manner and for such period as to give rise to a presumption that it had been dedicated as a highway if the owner of the soil were capable of such dedication. The owners from time to time of the soil of the footpath, other than the appellants and their predecessors in title as owners of the railway, had at no time been under such a disability as would render them incapable of dedicating the footpath as a highway and had made no application to quarter sessions for such a declaration as was sought by the appellants nor had such an application been made by any lessee or occupier (other than the appellants) of the soil of the footpath. If and when the appellants ceased to be bound to maintain the bridge for the benefit and convenience of the owners or occupiers of the land severed by the railway for whose benefit and convenience the bridge was originally constructed, by reason of the rights of those owners and occupiers having been released by agreement or abandoned or having otherwise ceased to be exerciseable, the appellants would demolish and discontinue the bridge, it being their practice so to deal with accommodation works as opportunity arose. There was no likelihood of the appellants wishing to construct additional lines of rails under the bridge or its approaches unless substantial new industrial development took place in the area served by the railway, and there was no prospect of such development. The continued existence of the bridge would not cause any danger to the running of the trains and the operation of the railway. The bridge was strong and durable, likely to last indefinitely with comparatively small repairs, and the cost of demolishing it would be at least £700. If it was to remain it would require repairs within the next two or three years at an estimated cost of £150 in every period of 10 years, so that the annual cost of maintenance capitalized would be appreciably less than the cost of demolition at present day prices. In so far as it was a matter of fact, the expenditure involved in the maintenance of the bridge was quite compatible with the present and future execution of the purposes for which the land was vested in the appellants.

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[1] Railway Clauses Consolidation Act, 1845, s. 16: "Subject to the "provisions and restrictions in this "and the special Act, and any Act "incorporated therewith, it shall be "lawful for the company, for the pur"pose of constructing the railway, or "the accommodation works connected "therewith, hereinafter mentioned, to "execute any of the following works: "(that is to say,)

"They may make or construct, . . . "across, under, or over any lands, ". . . such temporary or permanent ". . . tunnels, embankments, . . . "bridges, roads, ways . . . as they "think proper; . . .

"They may from time to time "alter, repair, or discontinue the "before-mentioned works or any of "them, and substitute others in their "stead; . . ."

S. 68: "The company shall make "and at all times thereafter maintain "the following works for the accom"modation of the owners and occu"piers of lands adjoining the rail"way; (that is to say,) Such "and so many convenient . . . "bridges, arches, culverts and pas"sages over, under . . . or leading to "and from the railway as shall be "necessary for the purpose of making "good any interruptions caused by "the railway to the use of the lands "through which the railway shall be "made; . . ."

It was contended on behalf of the appellants that the dedication of a public right of way over the bridge would be incompatible with the purpose of their railway undertaking in that (a) it would commit them in perpetuity to all such expense in the maintenance of the bridge as might from time to time be necessary, which expense could be avoided if the bridge were demolished; (b) it would fetter their powers to expand their railway undertaking by the construction of additional lines of rails if and when they might require to do so; and (c) it would deprive them of their statutory powers to discontinue the bridge and crossing pursuant to section 16 of the Railway Clauses Consolidation Act, 1845.[1]

It was contended by the respondents (a) that there having been user of the footpath and the bridge in such manner and for such period as to give rise to a presumption that the same had been dedicated as a highway if the owner of the soil were capable of dedication, dedication ought to be presumed to have taken place; (b) that the user of the bridge by the public as a public footpath was not inconsistent with the operation of the railway and the execution of the purposes for which the bridge and adjoining railway land was vested in the appellants and their predecessors; (c) that the dedication of a public right of way over the bridge would only be incompatible with the execution of the functions of the appellants and their predecessors if it were to involve them in a material increase in expenditure and that on the facts the appellants would not be involved in any increase in expenditure whatever; and (d) that section 16 of the Railway Clauses Consolidation Act, 1845, did not have the effect contended for by the appellants, otherwise its effect would be that railway undertakers as a matter of law could in no circumstances dedicate a right of way across any part of their railway.

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[1] See note on p. 216.

The appeals committee were of opinion that there had been dedication and accordingly refused to make the declaration sought by the appellants. The British Transport Commission appealed, and the question for the opinion of the court was whether on the facts found a dedication of the alleged public right of way was incompatible with the statutory objects of the Commission.

British Transport Commission *v.* Worcestershire County Council.

In this appeal the same questions arose in relation to a footpath passing through an underbridge crossing a railway line constructed under powers conferred by the Worcester and Hereford Railway Act, 1853, now owned by the British Transport Commission. The footpath was shown on the provisional map prepared by the Worcestershire County Council pursuant to the National Parks and Access to the Countryside Act, 1949, as a public right of way on November 1, 1952. The appeals committee of Worcestershire County Quarter Sessions, to whom the British Transport Commission applied on December 13, 1954, pursuant to section 31 of the Act, for a declaration that no public right of way existed through the underbridge on the date in question, found, inter alia, that the underbridge, constructed at the point of intersection of a footpath and the railway line, which was at that point carried on an embankment, had been so constructed as a private accommodation way for the benefit of the owners and occupiers of lands on either side of the railway line and severed thereby; that at the date of the construction of the railway no public right of way had existed at the point of intersection but that the footpath, including the way through the bridge, had been used by the public for more than 20 years prior to December 1, 1952, to such an extent and in such manner as to raise a presumption that it had been dedicated as a public right of way; that it was the settled policy of the appellants to remove such bridges to relieve themselves of the cost of maintenance and the liability involved in the continued existence of such structures, but that the cost of repairs necessary during the remainder of the life of the bridge would not be in excess of the expenses incurred in its removal. They held that the way through the underbridge had been dedicated and refused the declaration. The British Transport Commission appealed.

Both appeals were heard together.

Sir Frank Soskice Q.C. and *J. P. Widgery* for the British Transport Commission. The following two propositions are relied on: (1) A statutory body empowered by statute to take land for public purposes cannot use its powers so as to impose upon itself an additional burden of expense which is not necessary for the performance of its statutory functions because so to act is inconsistent with the statutory powers conferred upon it. (2) A statutory body which has vested in it by statute specific powers to be exercised for the common good cannot by its voluntary act renounce and deprive itself of those powers. *Great Western Railway Co.* v. *Solihull Rural District Council*[2] and *Ayr Harbour Trustees* v. *Oswald*[3] support those propositions.

A railway company which, by dedication, grants a right of way to the public over a private accommodation bridge imposes upon itself a burden inconsistent with the powers conferred by section 68 of the Railway Clauses Consolidation Act, 1845, because the railway company, by virtue of the dedication, renders itself liable to maintain the bridge in perpetuity. Moreover, the company deprives itself of its right to demolish the bridge in the circumstances contemplated by section 16 of the Act.

[LORD GODDARD C.J. referred to section 68. Would it be impossible for a railway company to dedicate by prescription a public way across a railway line?]

A distinction must be made between a crossing and a bridge. Whereas a crossing can be discontinued without interfering with the highway, for example, by removing the railway sleepers and the gates, a bridge cannot be removed without interfering with the highway.

As to the first proposition (supra), in *Great Western Railway Co.* v. *Solihull Rural District Council*[4] the dedication to the public of a right of way over the embankment of a reservoir was held to be incompatible with the statutory purposes of the canal company because it would involve the company in additional expense in maintaining the embankment which the company was not authorized to incur. The basis of the decision was that as the company was not authorized to incur such expense it could not prevent the decay of the embankment which would result from user by the public, and that by making the dedication the company would fetter itself in the exercise of its statutory duties: see the judgment of Collins M.R.[5] For the reasons given in the *Solihull* case[6] the present dedication would be ultra vires as it would require the appellants to earmark funds to maintain the bridge for the use of the public which ought to be used for other purposes. It would result in fettering the company in the exercise of its statutory duties. It is conceded that there is no fettering while the bridge has to be maintained as an accommodation bridge.

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[2] (1902) 86 L.T. 852; 18 T.L.R. 707.

[3] (1883) 8 App.Cas. 623.

[4] 86 L.T. 852.

[Lord Goddard C.J. In *Grand Junction Canal Co.* v. *Petty*[7] it was decided that once a towpath had to be maintained for the use of men with carts and horses it made no difference that the public was allowed to walk along it.]

A towpath, once there, is there for all time. It must be distinguished from a railway bridge which may be removed once the necessity of maintaining it for the accommodation of adjacent landowners has disappeared. Had the court in *Grand Junction Canal Co.* v. *Petty*[7] had in mind that the use of the towpath might be discontinued the decision might well have been different.

[Ashworth J. What weight do you attach to the expression "primary purpose" which is used by Collins M.R. in the *Solihull* case[8]?]

The primary purpose of the railway company is to run trains as efficiently as possible; if the trains can be run more efficiently without the bridge than with it, the dedication is a fetter on its primary purpose and therefore the case comes directly within the principle of the *Solihull* case.[8]

[Lord Goddard C.J. Ashworth J. is saying that the test laid down in the *Solihull* case[8] is, "does the dedication frustrate "the primary purpose of the undertaking?" It might well be a fetter on the right of the railway company to remove the bridge if at some future date it is not required for accommodation purposes, but how can it be said that the presence or absence of a bridge frustrates the primary purpose of the company, which is to run trains from Kendal to Windermere?]

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[5] 86 L.T. 852, 853.

[6] 86 L.T. 852.

[7] (1888) 21 Q.B.D. 273.

[8] 86 L.T. 852.

If that is the test to be applied, then the *Solihull* case[8] was wrongly decided, because it could not conceivably be said that the expenditure of money to maintain the embankment would frustrate the primary purpose of the canal company. It is submitted that the basis of the decision in that case was that the mere incurring of additional expense was ultra vires, and that it is not necessary for the appellants here to show that there has been a frustration of the primary purpose. If, as in the present case, additional expense which is not authorized by the statute will be incurred as a result of the dedication, then the dedication is ultra vires. So long as the bridge remains, the appellants cannot escape liability to maintain and repair it to keep it safe for passengers and trains passing respectively over and under it. Therefore the effect of dedication is to convert a temporary obligation imposed by section 68 into a permanent one. [Reference was made to *Midland Railway Co.* v. *Gribble.*[9]]

The doctrine in the *Solihull* case[10] was applied directly to a railway company in *Taff Vale Railway Co.* v. *Pontypridd Urban District Council*,[11] where the dedication of a footpath over an accommodation bridge was held to be incompatible with the statutory purposes of the railway company as it would fetter the company's right to widen the railway lines. *Thames Conservators* v. *Kent*[12] concerned a towpath, and the decision turned on the fact that there was not sufficient evidence of dedication, but from the statement of Scrutton L.J.,[13] who comments on the principle in so far as additional expenditure is concerned, it is clear that where the grant of a right of way involves considerable extra expense it is ultra vires; where the expense involved is trifling the court will disregard it: see *Lancashire and Yorkshire Railway Co.* v. *Davenport.*[14] *Rex* v. *Inhabitants of Leake*[15] carries the matter on this branch of the argument no further. In any event it is distinguishable from the present case because it concerned an embankment which could not be removed.

[Lord Goddard C.J. The justices have found that the additional expense involved in maintaining the bridge would be negligible. That seems to dispose of the matter.]

As to the second proposition (supra), a statutory body cannot lawfully abrogate a power vested in it by statute to be exercised for the public good. In the present case the public good is the efficient running of the railway. The case finds that it is the practice and desire of the appellants to demolish these bridges as soon as they can, and it must be assumed that their removal is in the best interests of the running of the railway. Ipso facto, by putting it out of their power to demolish the bridge when no longer required for accommodation purposes the appellants are voluntarily abrogating the power conferred upon them by section 16 of the Railway Clauses Consolidation Act. Therefore the dedication impinges upon the statutory powers conferred upon the Commission and is ultra vires. That principle was laid down in *Ayr Harbour Trustees* v. *Oswald*,[16] and was stated and affirmed by Lord Birkenhead L.C. in *Birkdale District Electric Supply Co. Ltd.* v. *Southport Corporation*,[17] where the *Ayr* case [18] was considered but distinguished on its facts. Lord Sumner [19] formulated the principle on which the appellants here rely, namely, that in cases like the *Ayr* case,[20] quite apart from any question of evidence of incompatibility, such as the incurring of additional expense, the nature of the grant speaks for itself. In that case the trustees were held to have renounced a part of their statutory birthright. That applies exactly to the present case. The statutory birthright is the fasciculus of rights which the statute has placed at the disposal of the appellants as the railway authority. They cannot renounce any part of those rights.

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[8] 86 L.T. 852.
[9] [1895] 2 Ch. 129.
[10] 86 L.T. 852.
[11] (1905) 93 L.T. 126.
[12] [1918] 2 K.B. 272.
[13] Ibid. 293.
[14] (1906) 70 J.P. 129.
[15] (1833) 5 B. & Ad. 469.

[LORD GODDARD C.J. In the *Birkdale* case [21] Lord Sumner does not say " Nay " to the case where it has been held possible to do that. It is fantastic to talk about a statutory birthright in a case of this sort, just as it was in *Grand Junction Canal Co.* v. *Petty*.[22]]

[ASHWORTH J. If you rely on the principle of *Ayr Harbour Trustees* v. *Oswald*,[23] are you not committed to saying that a railway company can never dedicate at all because ipso facto, if it dedicates, that must in some sense affect its bundle of rights? It may be a question of degree.]

There may be exceptional cases where the doctrine of de minimis applies, but giving full weight to the question of degree it cannot be permissible for the appellants to forgo the right to demolish this bridge since to do so would infringe upon an express statutory duty conferred upon them by section 16. [Reference was also made to *In re South Eastern Railway Co. and Wiffin's Contract*[24] and *Stourcliffe Estates Co. Ltd.* v. *Bournemouth Corporation.*[25]]

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[16] 8 App.Cas. 623.

[17] [1926] A.C. 355, 364; 42 T.L.R. 303.

[18] 8 App.Cas. 623.

[19] [1926] A.C. 355, 372.

[20] 8 App.Cas. 623.

[21] [1926] A.C. 355.

[22] 21 Q.B.D. 273.

[23] 8 App.Cas. 623.

Whether the matter be approached on the basis of the *Solihull* case[26] or the *Ayr* case[27] the dedication is ultra vires.

Michael Rowe Q.C. and *E. S. Temple* for the county councils. The right of a statutory corporation to dedicate a highway to the public over its land is accurately set out in Pratt and McKenzie on Highways, 19th ed., pp. 20–22. It may do so, provided that use by the public is not incompatible with the purposes for which the land was vested in the corporation. Whether or not user by the public is or is not compatible with the statutory purposes of the corporation is a question of fact. *Rex* v. *Inhabitants of Leake*[28] supports those propositions: see in particular the judgment of Parke J.,[29] who states the principle. See also *Grand Junction Canal Co.* v. *Petty*,[30] *per* Lindley L.J.,[31] and *Birkdale District Electric Supply Co. Ltd.* v. *Southport Corporation*,[32] *per* Lord Sumner.[33] If the principle laid down in those cases is correct, then the only question is whether the dedication of this bridge is inconsistent with the running of the railway. If it is not, then the dedication can be made. In *Great Western Railway Co.* v. *Solihull Rural District Council*[34] the dedication of the embankment was incompatible with the statutory purposes of the canal company because its maintenance would have involved the company in considerable expense. That is not the case here.

[Counsel was not required to argue further on the question of compatibility.]

As to the appellants' second submission, in every case where the court has held a dedication by a railway company to be possible, the argument based on section 16 of the Railway Clauses Consolidation Act, 1845, must have arisen. The only case other than the present where that argument appears to have been advanced is *Attorney-General ex rel. Barnes Urban District Council* v. *London and South Western Railway Co.*,[35] but Farwell J. was not sufficiently impressed with the argument to mention it in his judgment. That case concerned a railway crossing and was decided on the basis that dedication would be incompatible with the statutory purposes of the railway company.

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[24] [1907] 2 Ch. 366.
[25] [1910] 2 Ch. 12.
[26] 86 L.T. 852.
[27] 8 App.Cas. 623.
[28] 5 B. & Ad. 469.
[29] Ibid. 478.
[30] 21 Q.B.D. 273.
[31] Ibid. 277.
[32] [1926] A.C. 355.
[33] Ibid. 368.
[34] 86 L.T. 852.
[35] (1905) 69 J.P. 110.

See also *Arnold* v. *Morgan*,[36] where Pickford J.[37] referred specifically to Farwell J.'s judgment in the *Barnes* case.[38] In *Taff Vale Railway Co.* v. *Pontypridd Urban District Council*[39] the point was not mentioned. That case appears to be the only one relating to a railway bridge, and it was there decided as a question of fact that the dedication of the right of way over the bridge would be inconsistent with the statutory purposes of carrying on the railway. It is clear from the proviso to section 68 of the Railway Clauses Consolidation Act that a railway company is not required to construct accommodation works which would obstruct the working or using of the railway. On the authorities that is the matter to which the court must direct its attention as a question of fact. In *Great Central Railway Co.* v. *Balby-with-Hexthorpe Urban District Council*[40] Joyce J. drew a distinction between an accommodation way and a perpetual right of way running over railway lines or over public land acquired for the purpose of running railway lines.[41] In his judgment Joyce J. specifically stated that he was not referring to a bridge.[41]

In *South Eastern Railway Co.* v. *Cooper*[42] the grant of a right of way over a level-crossing was held to be compatible with the working of the railway, although the public user had increased to such an extent as to cause inconvenience to the railway. If it is possible to dedicate a right of way over actual running lines, it ought to be possible to dedicate a right of way over a bridge provided that it is not incompatible with the running of the railway. The railway authority's obligation to repair the bridge remains only so long as the bridge is required as an accommodation bridge. If it ceases to be so, their obligation ceases. If the way over the bridge becomes a public highway, then the highway authority assumes the obligation to repair. Section 47 of the National Parks and Access to the Countryside Act, 1949, recognizes the difficulty which might arise if the county council became responsible for repairing the highway over the bridge and the rural district council for the repair of the bridge itself. That section limits the future liability of the railway authority to repair.

The true principle of law is that laid down in *Rex* v. *Inhabitants of Leake*,[43] which has never varied since and was accepted by Lord Sumner in the *Birkdale* case.[44] If that is right, and the question of compatibility or incompatibility is a question of fact, then all that the court has to consider in the present case is whether the justices erred in any way in coming to the decision they did on the facts they found. It is clear from the way that the case has been stated that the points were clearly put and the proper authorities cited to the appeal committee. The question of compatibility was properly considered and the committee addressed their minds to the right problems; they have found their facts clearly and unambiguously and have come to the right conclusion.

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[36] [1911] 2 K.B. 314.
[37] Ibid. 323.
[38] 69 J.P. 110.
[39] 93 L.T. 126.
[40] [1912] 2 Ch. 110; 28 T.L.R. 268.
[41] [1912] 2 Ch. 110, 122.
[42] [1924] 1 Ch. 211.
[43] 5 B. & Ad. 469.

Ayr Harbour Trustees v. *Oswald*[45] is founded upon an entirely different principle and has no application to the present case. It is not inconsistent with the cases based on incompatibility.

Sir Frank Soskice Q.C. in reply. In *Rex* v. *Inhabitants of Leake*[46] and the other cases cited, with the exception of *Attorney-General ex rel. Barnes Urban District Council* v. *London and South Western Railway Co.*,[47] the judges directed their minds to the question of incompatibility only. It is doubtful whether the *Ayr* principle could have been applied in *Rex* v. *Inhabitants of Leake*[48] and *Grand Junction Canal Co.* v. *Petty*.[49] It is incorrect to say that there is a line of cases in which it has been held that there has been dedication. *Great Central Railway Co.* v. *Balby-with-Hexthorpe Urban District Council*[50] decided that a railway company could not grant a perpetual right of way over its railway lines. *Cooper's* case[51] was not a right of way case at all and cannot be relied on as one of a line of cases. Except for the *Barnes* case[52] there is no case relating to a level-crossing where it has been held that there has been dedication.

It is true that *Ayr Harbour Trustees* v. *Oswald*[53] concerns an entirely different principle. For that reason the authorities which lay down the proposition that compatibility or incompatibility is a question of fact are irrelevant in considering the application of the principle. If the court was not asked in previous cases to consider the point which arises under section 16, it may be that the application of the *Ayr* principle to this class of case has never been appreciated before by Bar or Bench.

[Lord Goddard C.J. Is it your submission that all the cases about railway crossings were wrongly decided?]

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[44] [1926] A.C. 355.
[45] 8 App.Cas. 623.
[46] 5 B. & Ad. 469.
[47] 69 J.P. 110.
[48] 5 B. & Ad. 469.
[49] 21 Q.B.D. 273.
[50] [1912] 2 Ch. 110.
[51] [1924] 1 Ch. 211.
[52] 69 J.P. 110.
[53] 8 App.Cas. 623.

This court has power to say that cases were wrongly decided if it considers that a point which ought to have been taken was not taken. The fact remains that it has been taken here.

Cur. adv. vult.

BRITISH TRANSPORT COMMISSION *v.* WESTMORLAND COUNTY COUNCIL.

Jan. 23. LORD GODDARD C.J. The judgment I am about to read is the judgment of the court. This is a special case stated by quarter sessions for the county of Westmorland to whom an application was made by the appellants pursuant to section 31 of the National Parks and Access to the Countryside Act, 1949, for a declaration that no public right of way exists over a bridge spanning a railway owned and occupied by them in the borough of Kendal. The right of way in question is a footpath marked on the provisional map prepared by the respondents in accordance with the Act and the path crosses the railway line, which runs from Kendal to Windermere, by means of the bridge in question. The sessions refused to make the declaration sought and dismissed the application subject to this case. The question submitted is whether on the facts found a dedication of the alleged right of way was incompatible with the statutory objects of the predecessors in title whose undertaking is now vested in the Commission, and the whole argument in this court on behalf of the appellants was that the dedication found by the committee was ultra vires the railway company. [His Lordship stated the facts set out above and continued:]

Subject to the question of law stated above it has not been contended that sessions could not find as they did. The bridge in no way impedes the passage of trains or causes any danger to the railway and in no way affects the operation of the line. Apart from the question of dedication, if the bridge became unnecessary as an accommodation crossing, as it would be if the land on either side were acquired by the Commission or came into separate ownership, the appellants would demolish the bridge as that is their usual practice with regard to accommodation works which are no longer required.

Sessions gave an estimate of the cost of demolition and of the probable cost of maintenance, and found that the expenditure involved of maintaining the bridge is quite compatible with the present and future execution of the purposes for which the land is vested in the appellants. It is unnecessary to consider in any detail this question of expenditure. Even if the bridge were not needed for accommodation purposes its retention could not be said to put either on the Commission or on their predecessors such a burden as would make it a misuse of their funds to maintain it.

These being the facts, Sir Frank Soskice, for the appellants, submitted: (1) that a statutory body empowered to take land for public purposes cannot use its powers so as to impose on itself an additional burden which is unnecessary for the performance of its functions, and (2) that such a corporation to which this statute [the Kendal and Windermere Railway Act, 1845] gives special powers to be exercised for the common good cannot deprive itself of those powers.

A great many cases were cited to us, but we do not propose to go through them seriatim, for they are all conveniently summarized by Lord Sumner in his speech in *Birkdale District Electric Supply Co. Ltd.* v. *Southport Corporation.*[1] The locus classicus on this subject, and from which all the subsequent cases stem, is *Rex* v. *Inhabitants of Leake*,[2] in which Lord Wensleydale, then Parke J., said[3]: "If the land were vested by the Act of "Parliament in commissioners, so that they were thereby bound "to use it for some special purpose incompatible with its public "use as a highway, I should have thought that such trustees "would have been incapable in point of law, to make a dedication of it; but if such use by the public be not incompatible "with the objects prescribed by the Act, then I think it clear "that the commissioners have that power." That case has, as Lord Sumner showed,[4] been followed again and again, and such cases as *In re Gonty and Manchester, Sheffield and Lincolnshire Railway Co.*,[5] *South Eastern Railway Co.* v. *Cooper*,[6] and *Attorney-General ex rel. Barnes Urban District Council* v. *London and South Western Railway Co.*,[7] to take a few instances, show conclusively that a railway company can grant an easement of a way or dedicate a path to public use over its land provided that the grant or dedication is not inconsistent with the statutory purposes for which it was acquired. Whether the word used is "inconsistent" as in *Gonty's* case[8] or

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[1] [1926] A.C. 355, 368; 42 T.L.R. 303.

[2] (1833) 5 B. & Ad. 469.

[3] Ibid. 478.

[4] [1926] A.C. 355, 368.

[5] [1896] 2 Q.B. 439; 12 T.L.R. 617.

[6] [1924] 1 Ch. 211.

[7] (1905) 69 J.P. 110.

[8] [1896] 2 Q.B. 439.

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"incompatible" as in *Rex* v. *Inhabitants of Leake*,[9] the *Birkdale* case[10] and *Cooper's* case[11] show that that is the test which has been universally applied. This must be in every case a question of fact, and the sessions in the present case have so treated it. No one could possibly say that allowing a path to cross the land at this particular place by means of a bridge was inconsistent with the use as a railway of the land which it crossed. We will deal with *Ayr Harbour Trustees* v. *Oswald*,[12] on which Sir Frank mainly relied, after considering his second main submission, as we understood him to rely on that case for both heads of his argument.

The bridge in question, as we have said, was put up for the accommodation of the land owner through whose land the railway passed. Section 68 of the Railway Clauses Consolidation Act, 1845, requires the company to provide such gates, bridges, arches, culverts and passages under or by the side of or leading to or from the railway as may be necessary for the accommodation of the owners or occupiers. Section 16 sets out the various works which a railway company may execute, and the section applies both to works for the construction of the railway and to accommodation works. It contains a clause enacting that the company may from time to time alter, repair or discontinue the works and substitute others; and it is contended that if this passage over the bridge were dedicated the effect would be to deprive the company of a statutory right to remove it should it no longer be required as an accommodation work. If this contention be right, it is indeed strange that it has never before been the subject of a decision or even mentioned in any of the judgments on the subject. There does seem to be a trace of an argument on this point in *Attorney-General ex rel. Barnes Urban District Council* v. *London and South Western Railway Co.*,[13] but it can hardly have been pressed as the judgment of Farwell J.[14] does not refer to it. In *Taff Vale Railway Co.* v. *Pontypridd Urban District Council*[15] had the point been taken it would have afforded a short and complete answer. Wherever there is dedication a burden is placed on the land just as it is where an easement is granted, though the former may impose a heavier burden. It is no doubt true that a statutory company has only the powers that are given to it by the statute creating it (*Ashbury Railway Carriage & Iron Co.* v. *Riche* [16]), but of that case Lord Selborne L.C. said in *Attorney-General* v. *Great Eastern Railway Co.*[17]: "I "assume that your Lordships will not now recede from anything "that was determined in *Ashbury Railway Co.* v. *Riche* [18]; it "appears to me to be important that the doctrine of ultra vires, "as it was explained in that case, should be maintained. But "I agree with James L.J. that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that "whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized, "ought not (unless expressly prohibited) to be held, by judicial "construction, to be ultra vires." If, in the absence of a dedication, the Commission desired to remove this bridge it would, in our opinion, be wholly immaterial whether they did so in the exercise of an express power or of a power incidental to or consequential upon the things the legislature has authorized, namely, the running and management of the railway.

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[9] 5 B. & Ad. 469.

[10] [1926] A.C. 355.

[11] [1924] 1 Ch. 211.

[12] (1883) 8 App.Cas. 623.

[13] 69 J.P. 110.

[14] Ibid.

[15] (1905) 93 L.T. 126.

It remains only to consider the case so much relied on by the appellants—*Ayr Harbour Trustees* v. *Oswald*.[19] In our opinion that case has no application to the present. The harbour trustees were empowered by statute to acquire compulsorily an area of land for the purpose of their undertaking on payment of compensation to the owner of the land acquired. They sought to reduce the amount of compensation by offering to enter into a covenant with the dispossessed owner restricting themselves from building on or using a considerable portion of the land which the Act permitted them to take. To this the owner objected and claimed that he was entitled to be compensated for what he had lost and that the company had no power to sterilize the land, to use a convenient expression, and to covenant not to use that which the statute authorized them to acquire. It was held, to use Lord Sumner's expression in the *Birkdale* case,[20] that the company could not thus dispose of their statutory birthright. Here the dedication does not prevent the use of the land by the railway though it burdens it, as must always be the case where there is dedication. None of the cases suggest that dedication or the creation of an easement is ultra vires so long as it is not inconsistent with the statutory purpose for which the company was incorporated. That is the test and,

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[16] (1875) L.R. 7 H.L. 653.

[17] (1880) 5 App.Cas. 473, 478.

[18] L.R. 7 H.L. 653.

[19] 8 App.Cas. 623.

[20] [1926] A.C. 355.

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we think, may be said to be the only test which determines whether the dedication is intra or ultra vires.

For these reasons in our opinion the sessions came to a correct decision and this appeal is dismissed.

We understand that the other case in the list, *British Transport Commission* v. *Worcestershire County Council*, is covered by this case, and that will be dismissed also.

Appeals dismissed.

E. M. W.

The British Transport Commission appealed in both cases. Both appeals were heard together.

Sir Frank Soskice Q.C. and *J. P. Widgery*, for the British Transport Commission, repeated substantially the arguments placed before the Divisional Court and referred in addition to *South Eastern Railway Co.* v. *Warr*,[1] *York Corporation* v. *Henry Leetham & Sons Ltd.*[2] and *Emsley* v. *North Eastern Railway Co.*[3] It was contended that *Warr's* case[4] did not cover the present appeals, since *Ayr Harbour Trustees* v. *Oswald*[5] was not there cited.

Harold Williams Q.C. and *E. S. Temple* for the county councils. The appellants' case rests upon the fallacy that *Rex* v. *Inhabitants of Leake*[6] and *Ayr Harbour Trustees* v. *Oswald*[7] propound two distinct principles. The only principle is that a statutory body cannot dedicate a right of way over its property if such dedication would be incompatible with its statutory duties. That is a question of fact which was decided against the appellants by quarter sessions. In considering whether a dedication is incompatible with the statutory purposes of an undertaking regard must be had to the main or fundamental purposes for which its powers were granted, and not to its incidental or subsidiary purposes. In the present case the fundamental purpose is the making and operating of a railway, and it is not fundamentally incompatible to have a bridge running over the lines. The bridge being there, it is compatible to allow the public to walk over it. The public interest is always the paramount consideration. It is in the public interest that there should be railways and footpaths, and if the one is not incompatible with the other, there can be both. *Warr's* case [8] accurately explains the principle and the respondents rely on it. [Reference was also made to *County Hotel and Wine Co. Ltd.* v. *London and North Western Railway Co.*[9]]

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[1] (1923) 21 L.G.R. 669.
[2] [1924] 1 Ch. 557.
[3] [1896] 1 Ch. 418.
[4] 21 L.G.R. 669.
[5] (1883) 8 App.Cas. 623.
[6] (1833) 5 B. & Ad. 469.
[7] 8 App.Cas. 623.

Sir Frank Soskice Q.C. replied.

SINGLETON L.J. There are two appeals before the court. The first is an appeal by the British Transport Commission from a judgment of the Divisional Court in the case of the Westmorland County Council, and the second is likewise an appeal by the British Transport Commission in their claim against the Worcestershire County Council. I propose to deal generally with the case between the British Transport Commission and the Westmorland County Council. Everyone agrees that the same questions arise in the two appeals.

On June 30, 1845, an Act was passed, which by section 41 is a public Act, "for making a railway from the Lancaster and "Carlisle Railway to Birthwaite in the parish of Windermere, to "be called 'The Kendal and Windermere Railway.'" By section 3 of the Act, a number of gentlemen (who are named) and others were to be "united into a company for the purpose of "making and maintaining a railway to commence by a junction "with the Lancaster and Carlisle Railway at or near Oxenholme . . . to terminate at or near Birthwaite . . . with proper "works and conveniences belonging thereto, according to the "provisions of the said recited Acts and of this Act, and for "other purposes herein and in the said recited Acts contained; "and for the purposes aforesaid such company shall be incorporated by the name of 'The Kendal and Windermere Railway "'Company,' and by that name shall have power to purchase "and hold lands for the purposes of the undertaking within the "restrictions herein and in the recited Acts contained."

The British Transport Commission are the successors in title of the company which was incorporated under the provisions of the Act. Section 20 provided: "Whereas plans and sections of "the railway showing the lines and levels thereof, and also books "of reference containing the names of the owners, lessees, and "occupiers, or reputed owners, lessees, and occupiers, of the "lands through which the same is intended to pass, have been "deposited with the clerk of the peace of the County of Westmorland; be it enacted, that, subject to the provisions in this

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[8] 21 L.G.R. 669.

[9] [1918] 2 K.B. 251.

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"and the said recited Acts contained, it shall be lawful for the "said company to make and maintain the said railway and "works in the line and upon the lands delineated on the said "plans, and described in the said books of reference, and to enter "upon, take, and use such of the said lands as shall be necessary "for such purpose."

The Act incorporated a number of public Acts and in particular the Railway Clauses Consolidation Act, 1845, and we have been referred to two sections in particular of that Act. First, section 16, "Works to be executed," of which section I read a part: "Subject to the provisions and restrictions in this and the "special Act, and any Act incorporated therewith, it shall be "lawful for the company, for the purpose of constructing the "railway, or the accommodation works connected therewith, "herein-after mentioned, to execute any of the following works; "(that is to say)"; and I go to the last two headings—"Altera"tions and repairs: They may from time to time alter, repair, "or discontinue the before-mentioned works or any of them, and "substitute others in their stead"; and "General Power: They "may do all other acts necessary for making, maintaining, "altering, or repairing, and using the railway."

By section 68: "The company shall make and at all times "thereafter maintain the following works for the accommodation "of the owners and occupiers of lands adjoining the railway; "(that is to say,) Such and so many convenient gates, bridges, "arches, culverts, and passages, over, under, or by the sides of "or leading to or from the railway, as shall be necessary for the "purpose of making good any interruptions caused by the "railway to the use of the lands through which the railway "shall be made; and such works shall be made forthwith after "the part of the railway passing over such lands shall have been "laid out or formed, or during the formation thereof."

I think it convenient at this stage to draw attention to *Midland Railway Co.* v. *Gribble*,[1] which shows that, apart from section 16 of the Act, and assuming that it applies, there is no obligation on the railway company to keep open a bridge made by way of accommodation works once the necessity for it has ended. In the case to which I refer Lindley L.J. said[2]: "The words 'shall "'at all times maintain' do not mean that the company must "maintain it at all times if he does not want it. Having asked "for this accommodation and got it, he could if he chose release "it; and if he chose to release it there would be an end of the

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[1] [1895] 2 Ch. 827.

[2] Ibid. 830.

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"statutory obligation to maintain it. The maintenance of it is "not a public duty; it is a duty to him privately, and, of course, "to those claiming under him." Lopes L.J. said[3]: "An "accommodation work like this passage-way is a work necessary "for the purpose of making good any interruption caused by the "railway to the use of the lands through which the railway is "made, the lands on either side being in the occupation of the "same owner. That accommodation work is made by the railway "company for a special purpose, that special purpose being to "maintain a communication between the lands of the same "owner or occupier which have been intersected by the railway; "and, in my judgment, as soon as that special purpose is at an "end, and when, as Mr. Bridgman has admitted, it is practically "impossible now to use the work for that purpose, the accom"modation being no longer required, the obligation to afford it "also ceases."

The question which arises for determination is whether, on August 1, 1952, a public right of way existed over a bridge spanning the lines of the railway between Kendal and Windermere and within the borough of Kendal. The bridge was an accommodation work provided by the Kendal and Windermere Railway Co. and was necessary because the railway ran across the land of an owner on both sides of that which became the line, so that the bridge was necessary for the use of his land.

Paragraph 2 of the case sets out certain facts which had to be considered by the court of quarter sessions for the County of Westmorland in circumstances which I will detail in a moment. On the hearing of the railway company's application the court of quarter sessions found these facts: [His Lordship stated the facts as set out above, and continued:] Let me add to those findings of fact that so far as I have heard and read there is no evidence to show that the user by the public of the footpath over the bridge has ever caused any inconvenience to the British Transport Commission or to its predecessors in title.

On December 16, 1949, there was passed the National Parks and Access to the Countryside Act, 1949, Part IV of which places a formidable duty on county councils. Section 27 (1) provides: "Subject to the provisions of this part of this Act, the council "of every county in England or Wales shall, as soon as may be "after the date of the commencement of this Act, carry out a "survey of all lands in their area over which a right of way to "which this part of this Act applies is alleged to subsist, and

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[3] [1895] 2 Ch. 827, 832.

"shall, not later than the expiration of three years after that "date or of such extended period as the Minister may in any "particular case allow, prepare a draft map of their area, showing "thereon a footpath or a bridleway, as may appear to the "council to be appropriate, wherever in their opinion such a right "of way subsisted, or is reasonably alleged to have subsisted, at "the relevant date." Section 27 (6) contains certain definitions, including "'footpath' means a highway over which the public "have a right of way on foot only, other than such a highway at "the side of a public road."

Section 30 provides for the preparation of provisional maps and statements; and by section 31 (1): "At any time within "twenty-eight days after the publication of a notice under sub-"section (1) of the last foregoing section, the owner, lessee or "occupier of any land shown on the map to which the notice "relates, being land on which the map shows a public path, "or a road used as a public path, may apply to quarter sessions "for a declaration—(*a*) that at the relevant date mentioned in "the provisional statement there was no public right of way over "the land."

It was under that provision that the British Transport Commission applied to quarter sessions for a declaration that the footpath over the bridge in question was not a public footpath. The question which is raised is stated in paragraph 1 of the case. Paragraph 3 sets out the contentions of the appellants, the British Transport Commission. "It was contended by the appellants " that the dedication of a public right of way over the said bridge "would be incompatible with the purposes of the appellants' "railway undertaking in that: (a) it would commit the appellants "in perpetuity to all such expense in the maintenance of the "said bridge as might from time to time be necessary, which "expense could be avoided if the same were demolished; (b) it "would fetter the appellants' powers to expand their said railway "undertaking by the construction of additional lines of rails if "and when they might require to do so; and (c) it would deprive "the appellants of their statutory powers to discontinue the said "bridge and crossing pursuant to section 16 of the Railway "Clauses Consolidation Act, 1845." As I have pointed out, there might be the right to discontinue the bridge or to remove it, apart from section 16.

On the present appeal, Sir Frank Soskice (appearing for the British Transport Commission) did not pursue the contention which was originally before the court concerning the cost which would be incurred by the British Transport Commission if they had to keep the bridge in existence for all time, but his submission was really that which is (c) of those I have read: that it would deprive the appellants of their statutory powers to discontinue the bridge and crossing pursuant to section 16 of the Railway Clauses Consolidation Act, 1845. His submission became this. Those who built and made the railway lines, bridges, and the like, acquired the land under powers given them by the statute; and they cannot divest themselves of any of the powers so given. One of their powers is, he claimed, to discontinue the bridge in certain events; and he added that if there can be said to be a public right of way over the bridge the result would be that they would have to keep open something which they otherwise might discontinue and abolish. Thus, he claimed, they would be parting in effect with some part of that which they had acquired for statutory purposes, and they had no right to do that: in other words, the company could not deprive itself of the benefit of any part of the Act under which it was constituted, and could not grant or dedicate a right of way over this part of its property or over any part: for so to do would be to deprive itself of something given to it for a statutory purpose.

Paragraph 4 of the case sets out the contentions of the respondents, and it is right that I should read them. "(a) There having "been user of the said way numbered 29 and the said bridge in "such manner and for such period as to give rise to a presump-"tion that the same had been dedicated as a highway if the "owner of the soil were capable of dedication, dedication ought "to be presumed to have taken place.

"(b) The user of the bridge by the public as a public footpath "was not inconsistent with the operation of the railway and the "execution of the purposes for which the bridge and adjoining "railway land is and was vested in the appellants and their "predecessors.

"(c) The dedication of a public right of way over the bridge "would only be incompatible with the execution of the functions "of the appellants and their predecessors if it were to involve "the appellants in a material increase in expenditure, and on the "facts the appellants would not be involved in any increase in "expenditure whatever.

"(d) Section 16 of the Railway Clauses Consolidation Act, "1845, does not have the effect contended for it by the appel-"lants; otherwise its effect would be that railway undertakers "as a matter of law could in no circumstances dedicate a right "of way across any part of their railway; this proposition is not "supported in any decided case."

In paragraph 6 of the case, quarter sessions expressed their opinion in this way: "We were of opinion that there had been "dedication and accordingly refused to make the declaration "sought by the appellants." In paragraph 7, they state the question for the court: "The question for the opinion of the "High Court is whether on the facts aforesaid a dedication of "the alleged public right of way was incompatible with the "statutory objects of the appellants." As I have said, the question was put a little differently by Sir Frank Soskice, on behalf of the British Transport Commission.

The British Transport Commission appealed to the Divisional Court, who dismissed the appeal.[4]

In the Divisional Court Lord Goddard C.J. said[5]: "The "bridge in question, as we have said, was put up for the "accommodation of the land owner through whose land the rail-"way passed. Section 68 of the Railway Clauses (Consolidation) "Act, 1845, requires the company to provide such gates, bridges, "arches, culverts and passages under or by the side of or leading "to or from the railway as may be necessary for the accommoda-"tion of the owners or occupiers. Section 16 sets out the various "works which a railway company may execute and the section "applies both to works for the construction of the railway and to "accommodation works. It contains a clause enacting that the "company may from time to time alter, repair or discontinue "the works and substitute others; and it is contended that if this "passage over the bridge were dedicated the effect would be to "deprive the company of a statutory right to remove it should "it no longer be required as an accommodation work. If this "contention be right, it is indeed strange that it has never before "been the subject of a decision or even mentioned in any of the "judgments on the subject."

After referring to various authorities, Lord Goddard C.J. said[6]: "None of the cases suggest that dedication or the "creation of an easement is ultra vires so long as it is not "inconsistent with the statutory purpose for which the company "was incorporated. That is the test and we think may be said "to be the only test which determines whether the dedication is "intra or ultra vires."

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[4] Ante 226.

[5] Ante 228.

[6] Ante 229.

The British Transport Commission appeals to this court. We have had cited to us a large number of authorities. I do not propose to go through all of them. I take the view (putting it generally) that the passage I have just read in the judgment of the Divisional Court correctly expresses the authorities—"None "of the cases suggests that dedication or the creation of an "easement is ultra vires so long as it is not inconsistent with the "statutory purpose for which the company was incorporated." That, as was said in the Divisional Court, is the test to be applied.

In order to determine the question, it is first necessary to consider what was the object of the statute incorporating the original company. The object was the making and the maintaining of a railway, and of railway lines. Sir Frank Soskice said early in the appeal that his submission would be that the railway company to which statutory powers were given could not dedicate a right of way over the bridge because it would involve the abrogation by them of an express statutory power vested in them by section 16 of the Railway Clauses Consolidation Act, 1845: they would be putting it out of their power to discontinue and to remove the bridge. On the following day, he put it in this way: they cannot, by a voluntary dedication of a right of way, put themselves in a position no longer to be able to exercise an express power which Parliament has vested in them to take down a bridge once the necessity for its maintenance has disappeared.

The first case to which I desire to refer is *Rex* v. *Inhabitants of Leake.*[7] It is upon that which was said in that case (which has been approved in the House of Lords and which holds good today) that the determination of this matter seems largely to depend. The headnote reads: "The inhabitants of a parish "are bound by law to repair all roads within it dedicated to "and used by the public, although there be no adoption of "such roads by the parish. Where land is vested in fee in "trustees for certain public purposes, they may dedicate the "surface to the use of the public as a highway, provided such "use be not inconsistent with the purposes for which the land "is vested in them. By an Act for draining fen lands, commis"sioners were authorised to make drains and other works therein "prescribed, and also to make a new cut or main drain as therein "mentioned, and to dispose of all earth and soil arising from the "drains directed to be made, in forming banks, at certain "distances, on each side thereof; and the banks, drains, etc.,

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[7] (1833) 5 B. & Ad. 469.

"were to remain under their control, for the purposes of the Act. "The commissioners, under the powers of the Act, made a drain "according to the Act, and with the earth taken from it made a "bank on one side of it, of the average breadth of 40 feet: "this drain and bank were never part of the fen, but were old "inclosed land, and bounded by old inclosures on both sides; "and the land upon which they were respectively made, was "purchased by the commissioners for the purposes of the Act. "The bank had been used for about 25 years as a public high-"way, and was a convenient and useful road for the public. "Upon a special case, stating these facts, it was held by Denman "C.J. and Parke J., Littledale J. dissentiente, that the dedica-"tion of this part of the bank as a road to the use of the public "was not inconsistent with the purposes to which the commis-"sioners were bound by the Act to apply it; it not appearing by "the case, (which, however, ought to have been more express on "these points; *per* Parke J.) that the cleansing of the drains "or any other purpose of the Act had been or was likely to be "interfered with by such user of the soil."

I propose to refer first to the judgment of Littledale J., who said[8]: "It is true that the bank has not, for a great number "of years, been practically used to give any further protection "or support of the works than it did when first made, and very "probably it never may be wanted in any other state than that "in which it now is. But I cannot take judicial notice of that, "and I cannot say but at some future time it may be wanted "for the works of the drainage, in such a manner as that it could "not be used beneficially for these purposes if there was a "common highway over it. And I think the commissioners had "no power to dedicate to the use of the public as a highway, "land which they were entrusted with the ownership of, for a "special purpose, and for which special purpose this land may "at some future period be required; and as all the King's "subjects are presumed to know Acts of Parliament, they, when "they used the road, must be presumed to have known that in "point of law it could not be so dedicated, and that it could "only be used as a way of permission and sufferance; and they "cannot be considered as having acquired a right by adverse "enjoyment, but only by usurpation on rights which were desig-"nated by Parliament, and which, therefore, could not be "infringed upon." The words of importance are, "And I think "the commissioners had no power to dedicate to the use of the

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[8] 5 B. & Ad. 469, 483.

"public as a highway, land which they were entrusted with the "ownership of, for a special purpose, and for which special "purpose this land may at some future period be required."

I do not disguise from myself the great force of those words. It may appear odd, if a statutory body is entrusted with certain power and is given the right to acquire, compulsorily or otherwise, land on which it can exercise those powers, that it should be able to dedicate, or to grant, rights of way over the land which it has acquired under those powers. On the other hand, a different view was taken by Parke J. (later Lord Wensleydale) and by Lord Denman C.J. Parke J. said[9]: "If the land were "vested by the Act of Parliament in commissioners, so that they "were thereby bound to use it for some special purpose, incom"patible with its public use as a highway, I should have thought "that such trustees would have been incapable, in point of law, "to make a dedication of it; but if such use by the public be not "incompatible with the objects prescribed by the Act, then I "think it clear that the commissioners have that power. The "mere circumstance of their not being beneficial owners, cannot "preclude them from giving the public this right." That opinion was shared by Lord Denman C.J., who gave the last judgment. It has been accepted as good law ever since, and we have to treat this case upon that basis.

Sir Frank Soskice referred us to *Ayr Harbour Trustees* v. *Oswald.*[10] The Ayr Harbour trustees were empowered by statute to acquire compulsorily an area of land for the purposes of their undertaking, on payment of compensation to the owners of the land acquired. They sought to reduce the amount of compensation by offering to enter into a covenant with the dispossessed owner restricting themselves from building on or using a considerable portion of the land which the Act permitted them to take. To this the owner objected, and claimed that he was entitled to be compensated for what he had lost and that the company had no power to sterilize the land which they had acquired and to covenant not to use it for the purpose for which the statute gave them power to acquire it. Lord Blackburn said[11]: "I think "that where the legislature confer powers on any body to take "lands compulsorily for a particular purpose, it is on the ground "that the using of that land for that purpose will be for the "public good. Whether that body be one which is seeking to "make a profit for shareholders, or, as in the present case, a

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[9] 5 B. & Ad. 469, 478.

[10] (1883) 8 App.Cas. 623.

[11] Ibid. 634.

"body of trustees acting solely for the public good, I think in "either case the powers conferred on the body empowered to "take the land compulsorily are intrusted to them, and their "successors, to be used for the furtherance of that object which "the legislature has thought sufficiently for the public good to "justify it in intrusting them with such powers; and, conse"quently, that a contract purporting to bind them and their "successors not to use those powers is void"; from which counsel submitted that if the railway company did something which was equivalent to dedication they had no power to do that, for it would be divesting themselves of a power which they had—in this case, the power to remove the bridge if and when its retention became unnecessary.

Lord Watson, in the same case, said[12]: "To give effect to "the terms of the minute would, in my opinion, be to affirm "that the appellants have power to repeal the provisions of the "Act, in so far as these apply to the land taken from the "respondent; and as I can find no indication of an intention on "the part of the legislature to vest any such power in the "appellants, I think the minute is altogether invalid."

Undoubtedly there is much to be said for the argument that a railway company so constituted had not the power to do that which it is said they did; but there is a line of authority following upon those to which I have referred which shows conclusively (as it seems to me) that the courts have adopted the view expressed by Parke J. in *Rex* v. *Inhabitants of Leake*.[13]

I refer now to *Birkdale District Electric Supply Co. Ltd.* v. *Southport Corporation*.[14] I do not propose to go into the facts of that case; they are not relevant for consideration here. I would refer to the speech of Lord Sumner, for he reviewed the authorities upon questions of this kind. Lord Sumner referred to the judgment of Warrington L.J. in *South Eastern Railway Co.* v. *Cooper*[15] (which was cited to us and to which I do not propose to refer again). Lord Sumner said[16]: "Warrington L.J., in *Cooper's* case,[17] where a private level "crossing was claimed, sums up the rule by saying, that a "statutory company has no power to grant any easement, unless "expressly or impliedly authorized, but that its inability in this "respect is confined to the granting of easements, the enjoyment "of which is incompatible or inconsistent with the employment

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[12] 8 App.Cas. 623, 639.

[13] 5 B. & Ad. 469.

[14] [1926] A.C. 355; 42 T.L.R. 303.

[15] [1924] 1 Ch. 211.

[16] [1926] A.C. 355, 370.

[17] [1924] 1 Ch. 211.

"of the land for the statutory purposes for which it was acquired. "In the *Grand Junction* case,[18] Lindley L.J. says, that such "incompatibility is a matter of evidence, and, in practice, "evidence has regularly been given and considered for the "purpose of testing the question."

Lord Sumner also referred to the *Ayr Harbour Trustees* case [19] in this way [20]: "My Lords, I do not think that there is "a true analogy between these cases. On examining the facts "in the *Ayr Harbour* case [21] it is plain that, in effect, the "trustees did not merely propose to covenant in a manner that "committed the business of the harbour to restricted lines in "the future; they were to forbear, once and for all, to acquire "all that the statute intended them to acquire, for, though "technically they acquired the whole of the land, they were to "sterilize part of their acquisition, so far as the statutory "purpose of their undertaking was concerned. This is some "distance from a mere contract entered into with regard to "trading profits. The land itself was affected in favour of the "former owner in the *Ayr* case [21] just as a towpath is affected "in favour of the owner of a dominant tenement, if he is given "a personal right of walking along it. If the Ayr trustees had "reduced the acquisition price by covenanting with the respondent for a perpetual right to moor his barges, free of tolls, at "any wharf they might construct on the water front of the land "acquired, the decision might, and I think would, have been "different. There is, however, another aspect of the *Ayr* "*Harbour* case [21] which ought to be loyally recognized. It is "certainly some ground for saying that there may be cases "where the question of competence to contract does not depend "on a proved incompatibility between the statutory purposes "and the user, which is granted or renounced, but is established "by the very nature of the grants or the contract itself. It was "not proved in the *Ayr* case [21] that there was any actual incompatibility between the general purposes of the undertaking and "the arrangement by which the particular proprietor was to be "spared a particular interference with the amenities or the "advantages of his back land. I think the case was supposed "to speak for itself and that, in effect, the trustees were held "to have renounced a part of their statutory birthright. The "appellants, however, contend, and Russell J. appears to have "thought, that your Lordships' House extended other principles,

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[18] (1888) 21 Q.B.D. 273.

[19] 8 App.Cas. 623.

[20] [1926] A.C. 355, 371.

[21] 8 App.Cas. 623.

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"namely, those applicable to servitudes over land acquired, to "mere contracts restricting the undertakers' future freedom of "action in respect to the business management of their undertaking. This point of view ought therefore to be examined."

It is from that part of the speech of Lord Sumner that there arises an expression which has been used often in this and other cases—"held to have renounced a part of their statutory birth-"right." Lord Sumner pointed out that in the *Ayr* case[21] the facts spoke for themselves. The trustees of the harbour had acquired certain land for uses for the purposes of the dock which they were about to construct and at the same time they sought to dispose of their right to do, on a part of the land they so acquired, that which was their statutory purpose; and those facts were sufficient to cause one to say that there was no question but that the thing spoke for itself. There was no need to go into any evidence. Sir Frank Soskice submitted to the court that likewise when one found that statutory undertakers—a railway company—were said to have dedicated a right of way over a bridge in circumstances in which, if it was so, they would be prevented from removing the bridge—an accommodation way—they had renounced a part of their statutory birthright, to wit, the right to remove it, possibly, at some time in the indefinite future. I do not regard it in that light. In considering the case I feel that one must bear in mind the general principles stated in the authorities, coupled with the fact that the bridge has existed for over 100 years now and that, so far as we know, for all that time members of the public have used it as they have passed along the footpath in question and over the railway bridge; and that has taken place without any inconvenience to the railway company or to their works or workers. I do not regard the possible loss of the right to terminate something at some time—something which might never become a loss at all—as parting with their statutory birthright.

Counsel referred the court to a decision of Simonds J. in *Heywood's Conveyance, Cheshire Lines Committee* v. *Liverpool Corporation*,[22] a case where there had been a covenant with regard to land and the decision of the judge was that there was no enforceable covenant in any event because the covenant originally entered into was void under the rule in *Ayr Harbour Trustees* v. *Oswald*.[23] The argument of Mr. Cyril Radcliffe (who appeared for the Cheshire Lines Committee) on that part of the case was: "Also, if a statutory corporation acquires land for "the purpose of its undertaking, it cannot fetter itself with a "covenant which impedes the best development of that land "for the purpose of the undertaking." Simonds J. said[24]: "It is said, in the second place, that there is no enforceable "covenant in any event, because the covenant originally "entered into was void and of no effect, under the doctrine of "the well-known case of *Ayr Harbour Trustees* v. *Oswald*.[25] In "my view, both those contentions are well-founded." He cited the words of Lord Sumner in the *Birkdale* case,[26] and he added[27]: "If one can imagine those words of restriction inserted "into the Act, it would clearly amount to a substantial restriction of the statutory purposes for which the legislature was "authorising the acquisition of these lands. That is something "which clearly cannot be done, in view of the case to which I "have referred, *Ayr Harbour Trustees* v. *Oswald*,[28] a case too "often cited for it to be necessary for me to refer to it."

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[21] 8 App.Cas. 623.

[22] [1938] 2 All E.R. 230.

[23] 8 App.Cas. 623.

In two or three authorities which were cited to us, Sir Frank Soskice, while pointing out differences on the facts that I recognize, submitted that they were not binding upon this court by reason of the fact that his point based on the words of Lord Blackburn and of Lord Watson in the *Ayr Harbour Trustees* case[28] had not been cited or considered by the court. The first of those cases was *Attorney-General ex rel. Barnes Urban District Council* v. *London and South Western Railway Co.*,[29] which I do not propose to consider. I think that there is quite a difference upon the facts (which are somewhat involved); and, during the course of later argument, I said to counsel that I thought we might leave it out of consideration. Still, I would not like it to be thought that those who constituted the court or the counsel who argued in *Attorney-General ex rel. Barnes Urban District Council* v. *London and South Western Railway Co.*[29] were not well acquainted with the principles of law stated in the *Ayr Harbour Trustees* case.[30]

The second of those cases is *South Eastern Railway Co.* v. *Warr*,[31] to which it is desirable that I should refer. "A "railway company brought an action for trespass for the climbing "over a locked wicket gate at a level crossing. The defence "was that a public footway ran through the crossing, and that

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[24] [1938] 2 All E.R. 230, 232.
[25] 8 App.Cas. 623.
[26] [1926] A.C. 355.
[27] [1938] 2 All E.R. 230, 233.
[28] 8 App.Cas. 623.
[29] (1905) 69 J.P. 110; 3 L.G.R. 1327.
[30] 8 App.Cas. 623.
[31] (1923) 21 L.G.R. 669.

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" such footway had been dedicated to the public by permitting " long user. The company contended that for the last thirty " years the gate had been locked from time to time, and, further, " that by the decision in *Great Central Railway Co.* v. *Balby-with-Hexthorpe Urban District Council*[32] . . . a railway " company could not dedicate a public highway across its lines, " and that even if there had been presumed dedication over land " granted to the company for statutory purposes, such dedication " was ultra vires the company, and void." It was held: " that " although there might have been interruption of the footway " at intervals during the last thirty years, yet evidence of long " user prior to that period established the dedication." It was held further: " that though a statutory company cannot dedicate " any part of its land so as to interfere with the objects for which " the company came into being, yet there is nothing to prevent " it dedicating a right of way to the public where the user of that " right of way is not inconsistent with the objects and obligations " of the company."

That was an appeal from a decision of Russell J.,[33] and the point which is of interest was not raised in the court of first instance before Russell J. but it was raised in the Court of Appeal. The Court of Appeal consisted of Lord Sterndale M.R., Warrington and Younger L.JJ. Lord Sterndale said[34]: " Although this appeal from Russell J. has taken a long time to " argue, I hope I may be able to compress my judgment into " very little space. There is no doubt about the principle, as " far as I can make out, to be applied. We had a great number " of cases cited to us, some of which, in my opinion, have very " little relation indeed to the point we have to decide. They " establish this proposition, and I do not think it has ever been " doubted, that a statutory body like a railway company cannot " alienate its land and cannot grant rights, whether public or " private, over its land which interfere with the statutory " purposes for which it has been established. I do not think that " has ever been doubted, and that is the only principle, in my " opinion, which is established by the very numerous cases to " which we have been referred on that point." I read that passage for it appears to me to recognize the principle of that which was said in the *Ayr Harbour Trustees* case.[35] Sir Frank Soskice has pointed out that that case, so far as the report shows,

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[32] [1912] 2 Ch. 110; 28 T.L.R. 268.

[33] (1922) 21 L.G.R. 65.

[34] 21 L.G.R. 669, 670.

[35] 8 App.Cas. 623.

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was not cited, but the passage which I have read shows that the principle was recognized by the court and was followed.

Lord Sterndale continued [36]: "I think this is also undoubted; "I do not think it has ever been questioned in this case, that in "order to establish a right of public highway there must be "proved not only user but a dedication by the owner of the "land." Then the Master of the Rolls referred to certain authorities and added: "But, at the expiration of a very long "argument, another point was raised, which is the only point "that has given me any difficulty at all, and that is this: "There is a decision in *Great Central Railway Co.* v. *Balby-with-"Hexthorpe Urban District Council* [37] . . . and I think it must "be taken to be the opinion of the learned judge who gave that "decision, that a railway company has not got the power to "dedicate a public highway across its lines"—that is the point taken. "I doubt if the learned judge meant more than this: "that if all you know is that the railway company is proposing "to dedicate, or is said to have dedicated, a public highway "across its lines of metals, and the conclusion is obvious that it "must interfere with the working of the railway, then it is "beyond the powers of the company to make such a dedication, "because, as I have said, nobody disputes that a railway company cannot grant a public or private right in such a way as "to interfere with the carrying out of its statutory powers"—again recognizing the force of the decision in the *Ayr Harbour Trustees* case.[38] Lord Sterndale added [39]: "If it could be shown "that the result of the dedication which gives access to the "footpath across the line to a large number of persons would "be such as to interfere with the statutory powers of the company, then the company could not give that access. That does "not seem to me to be doubted. It seems to me that must be "shown in some way. I do not care to discuss now upon whom "the onus is, because when you have got evidence on both sides "the matter of the question of onus does not become as a rule "very important. There must be disclosed by the evidence, such "as it is, something which shows that the company cannot "dedicate because to do so would be to interfere with its statutory "powers. There is here no such evidence given on either side, "and I decline entirely to say that, apart from evidence, the "giving of access to an unknown number of persons, who may be "few or may be many, to cross an existing highway is prima

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[36] 21 L.G.R. 669, 670, 674.

[37] [1912] 2 Ch. 110.

[38] 8 App.Cas. 623.

[39] 21 L.G.R. 669, 674.

" facie doing something that will interfere with the statutory " working of the railway. The evidence discloses nothing of the " kind. The evidence discloses as a matter of fact that this has " been used as a highway for something like 50 years, and no " interference with the statutory working of the railway has ever " occurred at all. Therefore, it seems to me that there is no " reason for interfering with the learned judge's judgment, and " that the appeal must be dismissed with costs."

No question of onus arises here. There is no evidence whatever that the using by the public of the footpath over the bridge is incompatible with the working of the railway, and no evidence to show that there has ever been any inconvenience caused to anyone. Therefore, upon the judgment of Lord Sterndale, it appears to me that this appeal should fail.

Let me add that Warrington L.J. said [40]: " Now this, I think, " is really indisputable and established by a long line of authorities, that in the case of a statutory body such as a railway " company which has acquired land for the purposes of its undertaking, it is not competent for a company to deal with its land " by way of partial alienation in such a way that the result may " be incompatible with the use by the company of the land which " was so acquired for the purposes for which it was acquired . . . " in my opinion, that proposition in its wide terms is not capable " of being supported if it be alleged that it is a presumption of " law, quite irrespective of the facts of the present case, that a " railway company cannot create a public footpath across its " rails. If that is put forward as a proposition of law, I venture, " with all respect, to disagree with it." Later he added [41]: " In my opinion, therefore, the plaintiffs could only succeed in " the present case in showing that the supposed dedication would " be ultra vires if there were evidence from which the court could " properly infer that the existence of a footway would be incompatible with the use of the land of the railway company for the " purposes for which it was acquired. Now, in the present case " there is not a scrap of evidence on that point, nor do I see " anything in the evidence which was given to lead me to suppose " that the use of this footway will ever be the slightest inconvenience to the railway company in the use of their rails, and " not only that, but I do not believe the company think so " themselves."

Younger L.J., at the end of his judgment said [42]: " I have

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[40] 21 L.G.R. 669, 675.

[41] Ibid. 677.

[42] Ibid. 678.

"nothing to add to the question of law which has been discussed "by my Lord and the Lord Justice. If I may be allowed to say "so, I entirely agree with what they have said on that part of the "case, and I agree that this appeal must be dismissed."

Perhaps that case is the nearest to the present case that we have seen. I have read some passages from the judgments. The decision is binding upon us. It appears to me that we are compelled to follow it. Over and above that, I regard it as in accordance with the line of authorities since the judgment of Parke J. in *Rex* v. *Inhabitants of Leake*.[43]

It appears to me that the law as so stated is recognized in an Act of the year 1932 to which I must now refer: to wit, the Rights of Way Act, 1932. Section 1 (1) provides: "Where a "way, not being of such a character that user thereof by the "public could not give rise at common law to any presumption "or dedication, upon or over any land has been actually enjoyed "by the public as of right and without interruption for a full "period of 20 years, such way shall be deemed to have been "dedicated as a highway unless there is sufficient evidence that "there was no intention during that period to dedicate such "way." The remaining words in the subsection have been repealed.

By section 1 (7): "Nothing in this section contained shall "affect any incapacity of a corporation or other body or person "in possession of land for public or statutory purposes to dedi"cate any such way where such way would be incompatible with "such public or statutory purposes." It appears to me that subsection (7) is placed in the section in order to preserve the position of a statutory undertaker. He is not to be deemed to have dedicated a way under subsection (1) unless the conditions set out in subsection (7) apply. Nothing in the subsection is to affect any incapacity of a statutory body to dedicate any such way where such way would be incompatible with such public or statutory purposes. Subsection (7) does no more than recognize and keep in existence the position which was there before the Act was passed. Sir Frank Soskice argued that the words in the first two lines of subsection (1) provide a difficulty for the respondents—"Where a way, not being of such a character that user "thereof by the public could not give rise at common law to any "presumption of dedication." The words "not being of such a "character that user thereof by the public could not give rise at "common law to any presumption of dedication," are inserted, it is suggested, in order to prevent there being any dedication by a public authority, a statutory body. I do not think that that argument of Sir Frank Soskice's is sound, having regard to the concluding words of subsection (1), and, in particular, to the introduction of subsection (7), which deals with the position of statutory bodies.

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[43] 5 B. & Ad. 469.

I have taken a little time, I fear, to state my views. I end by putting the case in this way: no position arises in which it can be said (to use Lord Sumner's words) that the railway company was depriving itself of its statutory birthright. It could, had it so desired, have prevented people crossing over the bridge 100 years ago, or 80 years ago; it allowed people to pass over the bridge and to use the footpath over it, generation after generation. The question for determination is whether or not the user by the public of the way across the bridge is incompatible with the performance by the statutory body of its public duties as set out in the Act which gave it power to acquire land. I believe that that is the test. It is the test stated in *South Eastern Railway Co.* v. *Warr.*[44] As I have said, the decision in that case binds this court, and it is in accordance with the decisions over the years. There is nothing which enables us to say that any different test ought to be applied in this appeal.

I agree with the decision of the Divisional Court, and I would dismiss these appeals.

Jenkins L.J. I agree. I appreciate the force of Sir Frank Soskice's argument based on *Ayr Harbour Trustees* v. *Oswald*,[45] and I am also sensible of the attractions of the similar view expressed on this very question of dedication by Littledale J. in his dissenting judgment in *Rex* v. *Inhabitants of Leake.*[46] It seems to me, however, that this court is bound by the authorities to uphold the decision at which the Divisional Court arrived.

I will not repeat the citations already made from the authorities, which begin with the judgment of the majority of the court in the *Leake* case,[46] and include the cases of *In re Gonty and Manchester, Sheffield and Lincolnshire Railway Co.*[47]; *South Eastern Railway Co.* v. *Cooper*[48]; and *Grand Junction Canal Co.* v. *Petty.*[49] This line of cases was referred to, by no means with disapproval, by Lord Sumner in *Birkdale District Electric Supply Co. Ltd.* v. *Southport Corporation.*[50] Finally, I should mention the case (to which my Lord has referred) of *South Eastern Railway Co.* v. *Warr.*[51]

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[44] 21 L.G.R. 669.
[45] 8 App.Cas. 623.
[46] 5 B. & Ad. 469.
[47] [1896] 2 Q.B. 439; 12 T.L.R. 617.
[48] [1924] 1 Ch. 211.
[49] 21 Q.B.D. 273.

According to these authorities companies, such as the predecessors in title of the Commission in the present case, in possession of lands for the purpose of operating a railway upon them under statutory powers, are not totally incapacitated from dedicating ways over their land to the public but are only incapacitated from so doing if the effect of the dedication will be incompatible with the public or statutory purposes for which they hold the land. The question whether in any given case the dedication of a particular way would be incompatible with the public or statutory purposes of the company or body concerned, is, according to the authorities by which we are bound, a question of fact, and, as I understand it, the question of fact is whether the existence of the way as a public footpath or highway would prevent or impede the efficient operation of the railway. That, in my view, is the question, and it is not open to us to hold that the question is not one of fact but one of law, so that one must look at the powers of the company or body concerned and see whether there are any of those powers, however unimportant, which might, in some event, be in any way obstructed or impaired by reason of the dedication, however improbable that event might be.

Looking at the facts of these two cases, it seems to me abundantly plain that there is here in fact no incompatibility in the sense which that expression should bear in a case such as this. The physical existence of the bridge (over the railway in the Westmorland case and under the railway in the Worcestershire case) quite obviously did not in any way impede the operation of the railway. The use of these ways by members of the public in addition to the adjacent owners on the severance of whose land they were provided could not affect the position one way or the other.

The Commission does not before us rely on any question of the expense of maintenance, but it appears from the two stated cases that any extra expense in that way would be a relatively trifling matter. The sole impediment that can be made out (so far as I understand) is that if and when, at some unpredictable time, the Commission became entitled to do away with these bridges owing to the land on either side of the line being no longer in common ownership, it might be prevented from doing

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[50] [1926] A.C. 355.

[51] 21 L.G.R. 669.

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so by the existence of a public right of way. It is to be observed that, quite irrespective of the existence of any public way, the bridges must be maintained for some future period of wholly unpredictable length by reason of the rights of the owners of the land on either side of the line for whose benefit these bridges were constructed. I cannot think that the possibility that, at some unpredictable future time, the Commission may be deprived of the opportunity it would otherwise have had of discontinuing these accommodation bridges suffices to make the dedication of public rights of way over them incompatible with the efficient operation of the railway within the meaning of that expression as used in the authorities by which we are bound.

Accordingly, I agree with my Lord that these appeals fail and should be dismissed.

Hodson L.J. I agree. I also feel that there is great force in the argument of the appellants, which finds a clear and convincing expression in the dissenting judgment of Littledale J. in *Rex* v. *Inhabitants of Leake*[52] and also derives support from the authoritative statement of the law in *Ayr Harbour Trustees* v. *Oswald*.[53]

To put the point in its shortest possible form, it is this. The Commission cannot repeal the Act of Parliament and it cannot voluntarily divest itself of express powers conferred by the Act of Parliament. It is said that it has done this very thing if it has dedicated to the public a right of way which it could otherwise discontinue. I think that the answer to this argument is that the authorities are too strong for the appellants. The dedication of rights of way has not been considered to be an abrogation of powers so long as it is not incompatible with the purposes of the company. (See the majority judgments in the *Leake* case,[54] and in particular the passage from the judgment of Parke J. included in the judgment of the Divisional Court from which the appeal comes.) The authorities which follow the *Leake* case[54] have been recognized by the House of Lords as containing sound law. It seems to me that they have considered the question of compatibility to be a question of fact, and when considering ultra vires, the courts have in these cases applied their minds not so much to the specific powers of the corporation (for example, to those specific powers which are contained in section 16 of the Railways Clauses Consolidation Act, 1845) but

[52] 5 B. & Ad. 469.

[53] 8 App.Cas. 623.

[54] 5 B. & Ad. 469.

rather to the general purposes of the corporation, looking at those purposes in their broadest sense.

A number of passages have been cited to us from the judgments of members of this court which seem to me to support that view. I have in mind the language used by Warrington L.J. in *South Eastern Railway Co.* v. *Cooper*[55] in referring to the statutory duty of the railway company. He considered the question to be whether the exercise of a general right of way such as was granted by the railway company would be inconsistent with the performance of its statutory duty of running trains with safety along the section of their line crossed by the defendants' level crossing. Similarly, in *Great Western Railway Co.* v. *Solihull Rural District Council*,[56] the Master of the Rolls referred to "the main purpose"; and in another case in this court, *Lancashire and Yorkshire Railway Co.* v. *Davenport*,[57] Stirling L.J., in an appeal from Walton J., quoted without adverse comment the question which had been put to the jury in the court below dealing with the "fundamental purpose" of the railway company in question.

Finally, I think that, apart from the reference by Lord Sumner in *Birkdale District Electric Supply Co. Ltd.* v. *Southport Corporation*[58] to the *Leake* case[59] and other cases, this line of authority has received statutory recognition in section 1 (7) of the Rights of Way Act, 1932. The court, in dealing with this problem, has, I think, not taken the narrow view which is contended for by the appellants but has looked at the matter from a broad point of view and has always regarded the question of compatibility as a question of fact to be decided on the facts of the particular case.

In those circumstances, I agree that these appeals must be dismissed.

Appeals dismissed.

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[55] [1924] 1 Ch. 211.

[56] (1902) 86 L.T. 852; 18 T.L.R. 707.

[57] (1906) 70 J.P. 129.

[58] [1926] A.C. 355.

[59] 5 B. & Ad. 469.

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Lord Goddard C.J., Hilbery and Byrne JJ.

Criminal Law—Fraud—Fraud on public—Common law misdemeanor—Fraud by individual on Crown or public—False profits accounts and false certificate of disclosure submitted by trader to inspector of taxes—Indictment charging trader with making false statements to prejudice of Crown and public with intent to defraud—Whether offence known to the law.

A taxpayer was convicted on eight counts of an indictment charging him with making false statements to the prejudice of the Crown and the public revenue with intent to defraud, by causing to be submitted to an income tax inspector, with intent to defraud, accounts showing the profits of his business over a number of years to be substantially less than they in fact were, and by delivering to the inspector a certificate of disclosure of facts relating to his tax liability which was false to his knowledge.

On appeal against conviction, on the ground that the offence charged was one not known to the law:—

Held, that the facts disclosed a fraud on the Sovereign, and that a fraud by an individual on the Sovereign or the public (which were synonymous terms) was an indictable misdemeanor at common law; and that the taxpayer, by sending in to the inspector of taxes documents which were false and fraudulent to his knowledge for the purpose of avoiding the payment of tax, had defrauded the Crown and the public and was therefore properly convicted of the offences charged.

Dictum of Lord Mansfield C.J. in *Rex* v. *Bembridge* (1783) 22 St.Tr. 1, 155 applied.

Rex v. *Bradbury* (1920), post, p. 262, approved.

APPEAL against conviction.

The appellant, Alan Harry Hudson, a farmer and fruit grower, was charged upon indictment at Nottingham Assizes on December 8, 1955, with making false statements to the prejudice of the Crown and the public revenue with intent to defraud. The indictment contained nine counts, on eight of which the appellant was convicted. Eight counts of the indictment concerned the submission of profit and loss accounts relating to the appellant's business to the inspector of taxes for the purposes of income tax which were afterwards found to be erroneous. The first count charged the appellant with causing to be delivered to an inspector of taxes with intent to defraud certain accounts relating to his business for the year ending March 31, 1945, which falsely stated that the profits of the business were £16,933 7s. 6d. whereas the true profits greatly exceeded that sum. Six other counts contained similar charges in respect of accounts for the years 1946 to 1951. One count, on which the appellant was acquitted, related to the submission of an account relating to the value of stock on hand at March 31, 1951. Count 9 charged the appellant with causing to be delivered to the inspector a certificate of disclosure wherein he certified that he had made a complete disclosure of all banking accounts existing in his own or his wife's name between April 6, 1939, and March 21, 1953, and of all facts bearing on his liability to income tax or other duty between those dates, well knowing such certificate to be false.

The appellant was fined a total of £2,600 with £1,500 costs. He appealed against his convictions on the ground that the offence charged was one unknown to the law.

N. E. Mustoe Q.C. and *Victor Durand* for the appellant. The appeal raises the following questions: On the counts relating to the submission of accounts, (1) whether causing false accounts to be submitted to the Commissioners of Inland Revenue is an offence at common law; (2) whether it is an offence by statute; (3) whether it is a valid proposition that a wrong is indictable if the Crown is concerned even though as between subject and subject it would give rise only to a civil action; (4) whether the judgment of Lord Mansfield C.J. in *Rex* v. *Bembridge* [1] is confined to acts done by Crown servants and by persons holding public office; (5) whether, if the judgment in that case is not confined to those two categories of persons it is good law today; (6) whether *Rex* v. *Bradbury; Rex* v. *Edlin*,[2] decided by Bray J. in 1920 at Winchester Assizes, was rightly decided. The same questions arise in respect of the certificate of disclosure which was the subject of count 9. That certificate is not a statutory document and therefore its submission could not have been an offence by statute.

[Lord Goddard C.J. Are not all those matters comprised in your first submission that it is not an offence at common law? The appellant was not indicted under the statute but at common law. He was indicted as a common cheat. Is there any difference in principle between the document which is the subject of count 9 and the other documents? All were sent in for the same purpose, viz., to throw dust in the eyes of the inspector of taxes.]

Rex v. *Bradbury*,[2] on which the Crown relies, only concerned accounts. It could not go to the certificate of disclosure.

The proposition that there is a common cheat is one which the court ought not to accept at the present time. In former days judges took the view that they were exercising the jurisdiction of the Court of Star Chamber and could decide whether a particular transaction was an indictable offence. None of the cases shows that the court acted in those days on any particular principle. They decided that in some cases the prevalence of the transaction, and in others, the public nature of the transaction, was sufficient to make it indictable. In the last 150 years the law has developed away from the conception that one can take a generality and apply it to specific instances.

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[1] (1783) 22 St.Tr. 1.

[2] See Note, post, p. 262. [Decision of C.C.A. affirming decision of Bray J. reported in [1921] 1 K.B. 562; 37 T.L.R. 88.]

[LORD GODDARD C.J. *Rex* v. *Bembridge*[3] lays down the circumstances in which cheating is indictable. I have always understood the law as laid down in Hawkins' Pleas of the Crown, 8th ed., vol. 1, p. 322, to be that if cheating is a matter which affects the Crown and the public, then it is indictable.]

In *Rex* v. *Bembridge*[3] Lord Mansfield C.J. was saying that it was an indictable offence to defraud the Crown if the fraud was perpetrated by a Crown servant or a person holding public office. Undoubtedly that ought to be an offence and it ought to have been made so by statute. What has happened is that a Government Department, founding itself upon Lord Mansfield's dictum, has instituted prosecutions in relation to the submission of accounts, recorded the fact that there has been a conviction, and brought the record of the conviction before the judge in subsequent cases, whereas the proper course is to go to Parliament and ask to have this made an offence by statute. In many cases the offence charged has been alternative to charges under the Perjury Act, 1911. This is the only case where the offence has been charged as a common law offence only. This type of case has never come before the Court of Criminal Appeal. In *Rex* v. *Bradbury*,[4] which came before the Court of Criminal Appeal in 1921, the point was not argued.

[BYRNE J. In East's Pleas of the Crown, 1803, vol. 2, p. 821, it is stated that all frauds affecting the Crown and the public at large are indictable.]

[LORD GODDARD C.J. Hawkins puts it in the same way, and that was broadened by Bray J. in *Rex* v. *Bradbury*.[5] Are there any cases where it is laid down that the propositions of Hawkins and East are no longer good law? If it is still good law that cheating the public is indictable then cadit quaestio.]

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[3] 22 St.Tr. 1.

[4] Post, p. 262; [1921] 1 K.B. 562; 37 T.L.R. 88.

[5] Post, p. 262.

The proposition that all transactions which defraud the Crown are indictable is too wide. The whole foundation of the present charge is in *Rex* v. *Bembridge*[6] and it is important to see how that case was decided. Bembridge, who succeeded one Powell as accountant to the late Lord Holland, Paymaster-General to the forces, did no more than fail to reveal certain matters to his superiors. The court said for the first time that the sort of conduct in which Bembridge was engaged was an indictable offence, but that case is not an authority for saying that some other kind of conduct is an indictable offence. Lord Mansfield's judgment goes no further than saying that the Court of King's Bench has a wide jurisdiction to punish crimes and that this is the kind of crime which it will punish. The first part of Lord Mansfield's dictum[7] draws a distinction between officers appointed by the King and Crown officers appointed by some other person. It is submitted that in the second part of the dictum, on which the Crown relies, Lord Mansfield intended to refer to Crown servants and public officers. The cases cited, namely, the archers' case,[8] and the case of the collector of murage,[9] concerned public officers. Lord Mansfield quoted Hawkins' Pleas of the Crown only to draw the distinction between cases of public officers and cases between subject and subject which gave rise only to a civil action. At that time the law had fewer processes and the only way in which a King could punish one of his officers for a breach of duty in his office was by indictment or criminal information. Bembridge was certainly a public officer, if not a Crown servant. Lord Mansfield did not have to go beyond that area of the law. In the second part of his judgment he took the opportunity to develop the argument that it was an offence not only for a Crown servant to act wrongly in his office, but also for a public officer who had not been appointed directly by the Crown to do so, and that had long been the law.

[LORD GODDARD C.J. Is not the true test whether it is a misdemeanor or not? It is a misdemeanor for a person to defraud the Crown.]

To constitute a misdemeanor the transaction must offend some interest of the public, but all transactions which offend some interest of the public are not necessarily misdemeanors.

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[6] 22 St.Tr. 1.

[7] Ibid. 155.

[8] Y.B. Liber assisarum, 27 Edw. III, pl. 17.

[9] 1 Roll.Rep., f. 2.

Booth v. *Arnold*[10] supports this argument. That was an action for slander for words spoken concerning an alderman of a municipal borough importing a charge that he had used his office for the purpose of dishonestly procuring advantage to himself. Lopes L.J. in his judgment,[11] on which reliance is placed, clearly took the view that *Bembridge's* case[12] was referable to public officers. In Halsbury's Laws of England, 1st ed., vol. 9, p. 485, *Bembridge's* case[12] is cited in support of the proposition that non-accounting by a public officer is a cheat. In Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., p. 1227, the same case is cited under the section "Misconduct by Executive "and Administrative Officials of the Crown." The editors have taken the view that the case is confined to public officers. There is no reference to *Rex* v. *Bembridge*[12] or to the propositions in Hawkins' Pleas of the Crown and East's Pleas of the Crown in Blackstone's Commentaries, nor is there any reference to any general proposition of law that if a person does something to defraud the Crown the fact that it is the Crown which is defrauded is sufficient to make it an indictable offence. [Reference was made to Blackstone's Commentaries, 8th ed., vol. 4, p. 157.] Stephens takes the view that it is undesirable for the court to create new offences: Stephens' History of the Criminal Law (1883), vol. 3, p. 358.

[LORD GODDARD C.J. This court has no intention of creating a new offence, but at present the court is of the opinion that it must follow the dicta of Hawkins and East and of Lord Mansfield in *Rex* v. *Bembridge*[12] as it interprets it.]

The propositions in Hawkins' Pleas of the Crown and East's Pleas of the Crown have never been either approved or disapproved. There has been no occasion for a court to say that those propositions are erroneous, but even if they are good law it must still be a matter for the court to say whether a particular transaction falls within them. If those propositions are to be taken in their fullest amplitude, then no fraud on the Crown can be taken to be other than an indictable offence. If that is applicable to the Commissioners of Inland Revenue, then it applies equally to all Government Departments.

[LORD GODDARD C.J. It has been applied to the Army in *Rex* v. *Jones*.[13]]

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[10] [1895] 1 Q.B. 571; 11 T.L.R. 246.

[11] [1895] 1 Q.B. 571, 579.

[12] 22 St.Tr. 1.

[13] (1777) 1 Leach 174 (case 89).

It is submitted that the principle laid down in Hawkins' Pleas of the Crown and in East's Pleas of the Crown is stated far too widely and ought not to be applied at the present day. East puts a far wider interpretation on *Rex* v. *Treeve* [14] than it can possibly bear. If Lord Mansfield's statement in *Rex* v. *Bembridge* [15] is to be taken as not being limited to public officers, then the principle ought not to be applied at the present day. The commissioners should have gone to Parliament and asked to have this made an offence by statute. They have never done so, but, finding their power to impose penalties has become ineffective, they have fallen back upon the dictum of Lord Mansfield.[15]

[LORD GODDARD C.J. There is no necessity to ask Parliament to make that which is a crime a crime. This class of offence affecting fraud on the public has been declared to be a misdemeanor. If it was an attempt by the Crown to put forward a new offence it would be a different matter, but defrauding the public has been an offence for nearly 200 years.]

As to the laying of tax charges at common law, the first reported case was *Rex* v. "*J.*," [16] which was heard in Northern Ireland before Andrews L.J., who said [17] that it had always been a common law offence to defraud the King of his revenue, and added that his opinion was in accordance with that expressed by Bray J. in *Rex* v. *Bradbury*.[18] It is submitted that *Rex* v. "*J.*" [19] was wrongly decided by process of analogy from one case to another.

Finally, no one looking at this indictment would see any reference to common law cheating. The indictment is applicable to specific offences, namely, causing the Inland Revenue to be defrauded. The appeal should be allowed.

Sir Reginald Manningham-Buller Q.C., A.-G., Richard Elwes Q.C. and *J. A. Grieves* for the Crown. This charge has been laid in over 100 cases since the year 1917, when it was laid for the first time. Of the convictions obtained six were before the decision in *Rex* v. *Bradbury*,[20] 25 between the date of that decision and 1946, and 69 since 1946, the cases being heard before 28 different judges of the High Court. Only in five cases has the point now argued by the appellant been taken, in none successfully. It is not the fact that alternative charges are always laid under the Perjury Act, 1911.

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[14] (1796) 2 East P.C. 821.

[15] 22 St.Tr. 1, 155.

[16] [1933] N.I. 73.

[17] Ibid. 78.

[18] Post, p. 262.

[19] [1933] N.I. 73.

[20] Post, p. 262.

There is no distinction to be drawn between accounts, a letter, or a certificate of disclosure. If any of them is submitted with intent to defraud, and to the prejudice of the Crown, that is an offence. The proposition put forward that the examples given by Lord Mansfield in *Bembridge's* case [21] were all instances where the individuals concerned held public offices is not acceptable. The levy of archers [22] might have been an incident of feudal tenure, but one does not know. The case concerning the collector of murage [23] emphasizes that anyone who collects anything for the use of the public, if he does not apply it accordingly, may be indicted. The point argued here was taken before Andrews L.J. in Northern Ireland in *Rex* v. "*J.*" [24] and rightly rejected. If the Indictments Act, 1913, had not been passed the indictment in the present case might have resembled the indictment in *Bembridge's* case [25] save for the fact that in that case there was fraudulent concealment. The appeal should fail.

LORD GODDARD C.J. stated the facts and continued: The point taken and argued with much ingenuity by Mr. Mustoe, after searching reports on the criminal law, is that the offence charged is unknown to the law. It is perfectly true that it is not an offence which is specifically included either in the Income Tax Acts or in the Perjury Act, 1911; it is an offence which arises in this way. Sometimes a trader, instead of making a return of his profits by inserting a figure in his income tax return, sends in accounts and leaves the inspector to decide how much his return should show. If the trader sends in incorrect accounts knowing that they are incorrect, he is deliberately endeavouring to defraud the Crown and to mislead the inspector who has to calculate the trader's liability to tax from the documents which he sends in. The object of the certificate of disclosure is to satisfy the income tax authorities that full disclosure has been made. Although they call it a "certificate," it is no more than a statement; it is not a statutory document. The income tax authorities say, in effect, "Tell us in so many words that you have made full "disclosure." If a trader says that he has made a full disclosure when he knows full well that he has not, then he is acting fraudulently.

The point argued here is that sending in these false accounts and giving this false certificate do not disclose an offence known to the law. These matters are not expressly mentioned in the Income Tax Acts or in the Perjury Act, 1911, because, I suppose, it was overlooked that traders sometimes send in accounts instead of including a specific amount in the return. But although they are not mentioned in any particular section of any particular Act, there is no reason why, if what is done is an offence at common law, it should not be prosecuted as such. Indeed, when this very point came before Andrews L.J., a judge of great experience in Northern Ireland, in *Rex* v. "*J.*,"[1] he expressly called attention to that fact. He said, in giving his various reasons[2]: "The second reason for my opinion is founded on the express "words in section 224 of the Income Tax Act, 1918, which "provides that the provisions of that Act 'shall not affect any "'criminal proceedings for any felony or misdemeanour.' There-"fore, no enactment which provides for the imposition of treble "charge or for power to have the matter considered at petty "sessions, in any way interferes with the common law rights of "the King."

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[21] 22 St.Tr. 1.

[22] Y.B. Liber assisarum, 27 Edw. III, pl. 17.

[23] 1 Roll.Rep., f. 2.

[24] [1933] N.I. 73.

[25] 22 St.Tr. 1.

Therefore, what we have to decide, and in my view the only point which we have to decide in the present case, is whether the facts disclose a common law offence; and the common law offence which is disclosed is a fraud on the Crown. That is the charge. It is laid down, first, in Hawkins' Pleas of the Crown, 8th ed., vol. 1, p. 322—a work of the highest authority which has been cited in the courts for many years—that " . . . all frauds affecting "the Crown and public at large are indictable as cheats at "common law, as in the following case." Then an illustration is given. The reason why one cannot simply say that cheating is an offence is because, if one subject merely cheats another by telling him lies, that is not indictable unless it amounts to a false pretence; but it is otherwise if the false representation or false device (or whatever it may be) is used to defraud the Sovereign, because that is a fraud on the public. The Crown and the public are really synonymous terms. In East's Pleas of the Crown (1803), vol. 2, p. 821, which is a book of at least as high authority as Hawkins' Pleas of the Crown, it is said: "All frauds affecting "the Crown and public at large are indictable, though arising out "of a public transaction or contract with the party." Then the author cites much the same cases as were cited in Hawkins.

The matter came before the Court of King's Bench in *Rex* v. *Bembridge*[3] in 1783, when a public officer, one Charles

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[1] [1933] N.I. 73.

[2] Ibid. 78.

[3] (1783) 22 St.Tr. 1.

Bembridge, was indicted for a fraud on the Crown because he had knowingly and wrongly certified the amount due from the late Paymaster-General, Lord Holland, to the Crown. It does not appear that he had gained anything from it, but he did it and did it fraudulently, as the jury found. Lord Mansfield C.J., giving the judgment of the court when a motion had been made for arrest of judgment, refused the motion on two grounds. He said this[4]: " . . . the objection then is, " that at most this amounts to a breach of trust, a concealment, " a fraud of a pecuniary nature, which is a civil injury, and " therefore not indictable; that he is accountable,—an agent, a " trustee that embezzles money, or by neglect suffers it to be " lost, is accountable,—for a civil injury, and not for a public " offence; and farther, they add, that there is no precedent exactly " the same. The law does not consist in particular instances, " though it is explained by particular instances and rules, but " the law consists of principles which govern specific and " individual cases, as they happen to arise. Now, there are two " principles which seem to me clearly applicable to this prosecution; the first I will venture to lay down is, that if a man " accepts an office of trust and confidence, concerning the public, " especially when it is attended with profit, he is answerable to " the King for his execution of that office; and he can only " answer to the King in a criminal prosecution, for the King " cannot otherwise punish his misbehaviour, in acting contrary " to the duty of his office, and that this holds equally by whomsoever or howsoever he is appointed to the office; . . . There " is another principle too, which I think applicable to this prosecution, and that is this; where there is a breach of trust, a " fraud, or an imposition in a subject concerning the public, " which, as between subject and subject, would only be actionable by a civil action, yet as that concerns the King and the " public (I use them as synonymous (*sic*) terms), it is indictable;" That is the clearest possible statement by a great master of the common law that a fraud on the public by an individual is indictable, although the particular fraud might not have been indictable if it had been a fraud by one subject upon another.

The simple question is, therefore, has that law ever been altered? We can find no case in which it ever has been altered. The doctrine laid down by Hawkins, and by East, was affirmed by Lord Mansfield in *Rex* v. *Bembridge*[5] in the clearest possible manner. Mr. Mustoe, in the course of his very careful argument,

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[4] 22 St.Tr. 1, 155.

[5] 22 St.Tr. 1.

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submitted that all that Lord Mansfield was deciding was that a fraud by a public officer on the public or on the Sovereign (which is the same thing) was indictable. But that is not only what Lord Mansfield decided. He did decide—and it has been repeated in other cases—that a fraud by a public officer on the public is indictable. It may be that a particular fraud by a public officer could only be punished by indictment, especially if he obtained no money from it, so that he could be made to account for it. But that is only one of the instances given. Then follows the other instance that if any subject, and not only a public officer, acts in such a way as to defraud the King, that is an indictable misdemeanor. That is exactly the case which we have here.

Thirty-five years ago the same objection was taken before Bray J. at Hampshire Assizes in *Rex* v. *Bradbury* and *Rex* v. *Edlin*,[6] where, on an indictment in the form used here (which had then been used by the Board of Inland Revenue for some two or three years), Bray J. held, without any hesitation apparently, that the facts disclosed a common law misdemeanor. This form of indictment has been used ever since by the Board of Inland Revenue where the offence charged is that of submitting false acounts. It has been challenged once or twice, but it has never been challenged after conviction by being brought up to this court. It seems to me perfectly clear that the communis opinio among lawyers has been that Bray J.'s decision was right, and I cannot see any ground upon which we can say that the authorities upon which he acted, and upon which we are acting today, have ever been limited or dissented from. In Northern Ireland the same view was taken in *Rex* v. "*J.*,"[7] to which I referred at the beginning of this judgment, and it has never been in any way dissented from there.

We think that the offence here consisted of sending in documents to the inspector of taxes which were false and fraudulent to the appellant's knowledge. That is a material part of the offence, and the jury found it proved. They had a very clear summing-up from Slade J., who took the same view as Bray J.[8] took, and as this court is taking. The jury must be taken to have found that the documents sent in by the appellant were not only false and fraudulent to his knowledge, but they must have taken the view, and the only possible view, that he did it

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[6] (1920), post, p. 262. [Decision of C.C.A. affirming decision of Bray J. reported in [1921] 1 K.B. 562; 37 T.L.R. 88.]

[7] [1933] N.I. 73.

[8] *Rex* v. *Bradbury*; *Rex* v. *Edlin* (1920), post, p. 262.

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for the purpose of avoiding the payment of tax. That is defrauding the Crown and defrauding the public. In my opinion, the appellant was properly convicted, and the law as stated by Hawkins, by East, by Lord Mansfield,[9] by Bray J.[10] and by Andrews L.J.[11] in Northern Ireland remains exactly as it always has been. This is and has always been a common law offence. It is not necessary for this court to make a new offence and we are not doing so. We are merely reaffirming what the common law has, in our judgment, always been on this matter. For these reasons the appeal is dismissed.

Appeal dismissed.

Solicitors: *Jaques & Co. for Ollard, Ollard & Sessions, Wisbech; Solicitor for Inland Revenue.*

E. M. W.

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[9] 22 St.Tr. 1.

[10] Post, p. 262.

[11] [1933] N.I. 73.

NOTE

1920
July 8, 9, 10, 12, 13, 14, 15.
Bray J.

REX *v.* BRADBURY. REX *v.* EDLIN.

Criminal Law—Fraud—Fraud on public—Common law misdemeanor—False statement in tax returns—Intent to prejudice public revenue.

Indictment.

The defendants, Allan Henry Bradbury and Charles Ernest Edlin, were charged at Winchester Assizes on July 8, 1920, on separate indictments, with conspiracy to cheat and defraud the King of money due in respect of income tax, excess profits duty and super-tax by making false statements and returns; making false statements in returns of income tax contrary to section 5 (*b*) of the Perjury Act, 1911; and delivering false returns tending to prejudice the King and the public revenue with intent to defraud the King contrary to the common law. Of the charges laid at common law five were alternatives charges to those laid under the Perjury Act and two related to the submission of false trading and profit and loss accounts of the business of Bradbury & Son & Co. Ltd., of which both the defendants were directors. The defendants pleaded not guilty on all counts.

T. W. H. Inskip K.C., Travers Humphreys and *T. H. Parr* for the Crown.

S. H. Emmanuel K.C., Sir Richard Muir and *G. H. Roberts* for Bradbury.

Sir Ellis Griffiths K.C. and *Harold Murphy* for Edlin.

At the trial counsel for the defendants objected to all the counts except the first (which alleged conspiracy) on the ground that they were bad in law. As to the counts alleging offences under the Perjury Act, they contended that the defendants were not indictable but punishable only under section 94 of the Finance Act, 1910, on summary conviction. As to the common law counts, it was contended that the offence charged was not an offence known to the law.

It was contended for the Crown that the charges were properly laid both under the Perjury Act and at common law.

[*Rex* v. *Treeve*,[1] *Rex* v. *Bembridge*[2] and East's Pleas of the Crown (1803), vol. 2, p. 821, were cited in argument.]

BRAY J. It is my conviction that these objections fail. I do not blame counsel for raising them; they are proper to be raised and it requires a clear decision in order to justify one in overruling them. The indictment here consists first of all of a general count for conspiracy. Now, the contentions that have been made before me do not affect that count, and whatever may have been the decision on these other counts there would still have remained this first count. But there are other counts, and some of them are based upon the Perjury Act, 1911, and others are based upon what is called the common law of England. I will deal with the first point, which is relative to the sections which deal with offences under the Perjury Act. [His Lordship then dealt with the charges under the Perjury Act, 1911, and held that the counts laid under section 5 of that Act were well laid, and must stand. He continued:] Then there are other counts charging them with offences under the common law. Count 3 is an instance, in which the defendants are charged with making a false statement with intent to prejudice the public revenue contrary to the common law, and then it gives particulars of the offence. It is said that that is not an offence known to the law, that it is not within the common law of England. It certainly struck me, when the argument was made, that if it was not an offence it was quite time it was made an offence. But the common law of England is based on common sense, and it seems to me to be eminently in accord with common sense that when a person commits an offence of this kind, and makes a false statement with a view to prejudicing His Majesty's revenue, it ought to be punishable. In my view it is an indictable offence because it comes within that class of case of which one or two have been cited today. All these cases affecting the Crown and the public at large are indictable, and in my opinion, therefore, these common law counts stand, save for one other argument. By section 178 of the Income Tax Act, 1842, it is provided that if there is such a fraudulent representation a certain penalty is provided. The penalty is that an offender shall, on proof before the commissioners acting for the district, be charged in excess treble the amount of duty escaped by the fraudulent representation. It is suggested that because there was an additional penalty imposed upon persons who offended against the Act, in their having to pay treble the duty evaded, that that repealed the common law of England. In my opinion it certainly did not. It added an additional burden or obligation if you like, but it

[1] (1796) 2 East P.C. 821.

[2] (1783) 22 St.Tr. 1.

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never did take away the right to proceed against an offender by indictment under the common law of England, and therefore these objections fail, and the defendants must proceed.

[The defendants were convicted on all counts and sentenced to two years' imprisonment.]

C. A.

1956
May 16, 17.

Denning, Birkett and Parker L.JJ.

SLATER *v.* CLAY CROSS CO. LTD.

[1954 S. No. 4533.]

Licensor and Licensee—Current operations on land—Duty of care to licensee—Negligence—Licensee injured by train in railway tunnel owned by occupiers of land—Train driver negligent—Right of action not barred by licensee's knowledge of danger—Volenti non fit injuria not applicable.

Volenti non fit injuria. Invitor and Invitee—Invitee or licensee—Duty of occupier—No valid distinction.

The plaintiff, while walking along a narrow tunnel on a railway track over land owned and occupied by the defendant company, was struck and injured by a train driven by the company's servant. In an action for negligence against the company the trial judge held that she was a licensee on the land and the track, and that the driver had been negligent in failing to observe instructions to whistle and to slow down when entering the tunnel, which the company knew was used by members of the public. He gave judgment for the plaintiff, though finding her guilty of contributory negligence. On appeal by the company:—

Held, (1) that where current operations were being carried out on land, the occupier's duty to licensees and to invitees alike was to take reasonable care not to injure them, and that by their negligence these occupiers had failed in that duty.

(2) That the maxim volenti non fit injuria did not apply to bar the plaintiff's right of action, for though she voluntarily took the risk of the known and obvious dangers arising from running the railway in the ordinary and accustomed way, she did not voluntarily take the risk of negligence by the occupier: her knowledge of the danger was a factor in contributory negligence, but was not a bar to her right of action.

P.271 'she may be said'

Dann v. *Hamilton* [1939] 1 K.B. 509; 55 T.L.R. 297; [1939] 1 All E.R. 59 applied.

Per curiam. The distinction between the duties of an occupier to invitees and licensees has virtually been abolished by the decisions of the courts.

Decision of Ashworth J. affirmed.

APPEAL from Ashworth J. sitting at Nottingham Winter Assizes.

The defendants, Clay Cross Co. Ltd., were the owners and occupiers of land over which ran a narrow gauge railway track 3 feet 3 inches wide which led through a tunnel about 8 or 9 feet high and 66 yards long. The track was used to carry limestone from the defendants' quarry at Crich, Derbyshire, for two and a half miles down to Ambergate. For many years it had been the practice of members of the public, including the plaintiff, Mrs. Ethel Anne Slater, with the permission and knowledge of the company, to walk along the tunnel. On February 12, 1953, the plaintiff was walking along the tunnel when a train owned by the defendants and driven by one of their servants was driven along the track and into the tunnel. The plaintiff lay down at the side of the track in an attempt to avoid the train, but the train struck her and ran over her right leg, as a result of which it had to be amputated below the knee.

The plaintiff brought an action claiming damages and alleging negligence against the company. She claimed that for many years it had been the practice of members of the public, including herself, with the permission and/or knowledge of the company, to walk along the tunnel, and that it was the practice of the company's servants who controlled the trains to stop each train at the mouth of the tunnel, and for one of the servants to go on foot along the tunnel to see whether it was safe for the train to enter and pass through the tunnel. She alleged that on the day of the accident the company had been negligent in failing to keep a proper look out, driving too fast, failing to give any sufficient warning of the train's approach, or to adopt the normal practice of stopping the train, or to warn the public by notice or otherwise that that practice had been discontinued. Alternatively, she claimed that she was a licensee in the tunnel, and that the driving of the train in the circumstances constituted a trap.

By their defence the company claimed that the plaintiff was a trespasser. Alternatively, they denied that they were under a duty to her to the extent expressly or impliedly alleged. If they were under any duty of care, they denied that they were in breach of any such duty or negligent, since the plaintiff knew or ought to have known of the dangers and risks of walking through the tunnel, and was accordingly without remedy. Alternatively, they relied on the maxim volenti non fit injuria. Further, or alternatively, they claimed that the plaintiff had been guilty of contributory negligence.

Ashworth J. found that the plaintiff was a person with the rights and obligations of a licensee. He found that instructions had been given to the drivers that on entering the tunnel they were to keep their heads down, to blow the whistle, and to slow down, and that on the day in question those instructions had not been observed. It was winter. The defendants had not been able to quarry fresh limestone up at Crich and were using existing stock; and instead of having the train pulled by one little steam engine they had a diesel engine on too, the steam engine being in front and the diesel engine pushing behind. If the steam engine had been on its own, the driver would have stopped before entering the tunnel and would have whistled. On this occasion the driver of the steam engine did not keep it pulling because he wanted to save up the steam for the gradient beyond, but the diesel engine went on pushing behind, and therefore the train did not stop at the entrance to the tunnel, the steam engine did not whistle at the entrance to the tunnel, and it did not slow down to a walking pace or stop, but went on at a pace which the judge put at eight miles an hour through the tunnel. The judge found that in the circumstances it was going too fast; and that it failed to whistle; and that those matters constituted negligence in that they had exposed the plaintiff to a risk which the defendants were well aware of, putting her in a position of great danger, and failing to take the necessary precautions to prevent such danger arising. But his Lordship found that the plaintiff had been guilty of contributory negligence, and in giving judgment in her favour assessed the full liability at £3,500, finding her negligent as to 40 per cent.; and he awarded her £2,100.

The company appealed.

Richard Elwes Q.C. and *Bernard Caulfield* for the company. First, though the relationship of licensor and licensee has lost some of its importance in relation to static defects in premises since the decision in *Hawkins* v. *Coulsdon and Purley Urban District Council*,[1] it is still important here, where there is a continuous process carried on intermittently and not by schedule on the land. Though Denning L.J. in *Hawkins's* case [2] defined "static" as "dangers which have been there for some time," and this moving railway had been there for some time, there is a difference of quality between, e.g., a defective step which no one should leave in that condition and a railway with trains. If that is correct, the company did not owe this licensee any duty save to warn her of a concealed danger; and as this danger was obvious and known to her, her action is not maintainable. She must take the land as she finds it: *Dunster* v. *Abbott*.[3] *Coleshill* v. *Manchester Corporation*[4] has not yet been overruled. Though the Law Reform (Contributory Negligence) Act, 1945, gives a licensee who has failed to take reasonable care for his own safety a right of action, the court in apportioning liability under that Act may consider whether the evidence of failure to take such care may not be such as to exonerate the licensor altogether. There is no distinction between going into a tunnel in which the licensee knows she is invisible and walking on a broken step which she can plainly see.

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[1] [1954] 1 Q.B. 319; [1954] 1 All E.R. 97.

[2] [1954] 1 Q.B. 319, 331.

[DENNING L.J. In the latter case it could be said to be wholly the fault of the plaintiff.]

Secondly, if there is no longer any valid distinction between the duty owed by the occupier of land to a licensee and to an invitee, the court is free to consider the question of negligence without reference to that relationship; and in that event the onus of proof of negligence is on the plaintiff. The evidence here did not justify a finding of negligence against the company.

Thirdly, the maxim volenti non fit injuria is applicable to these circumstances so as to bar the plaintiff's cause of action. In *London Graving Dock Co. Ltd.* v. *Horton*[5] the House of Lords decided that an invitee who was scienter of the unusual danger must fail in his action, and the defence based on volenti is therefore not strictly necessary to a defendant who can succeed on scienter. A defendant licensor is presumably in the same position; but the defences of sciens and volens overlap; and this licensee who came on to a railway line and into a tunnel must be held to be both sciens and volens of the danger of sharing it with a train. In *Dann* v. *Hamilton*[6]—not previously considered by this court—Asquith J. held that the maxim did not apply to the facts of that case, but he did not say that it could never be a defence where a defendant had been negligent; and his decision in that case has been criticized by Professor Goodhart (Law Quarterly Review, 1939 (vol. 55, pp. 184–185), on the ground that judgment should have been entered for the defendant because the plaintiff was guilty of contributory negligence in accepting a lift from a driver of a car whom she knew to be under the influence of drink. That criticism is adopted here, for though the criticisms

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[3] [1954] 1 W.L.R. 58; [1953] 2 All E.R. 1572.

[4] [1928] 1 K.B. 776; 44 T.L.R. 258.

[5] [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.

[6] [1939] 1 K.B. 509; 55 T.L.R. 297; [1939] 1 All E.R. 59.

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would now be barred by the Act of 1945, they are sound in principle. It is a question of degree and of fact in each case. Can it be said that this plaintiff was volens the train coming into the tunnel at walking pace and not volens if its speed was eight miles an hour, or volens if it whistled and not volens if it did not whistle? See also Salmond on Tort, 11th ed., p. 40, that the maxim does not apply where there is negligence; nevertheless, sciens must be taken as volens here unless one looks at the matter artificially.

Fourthly, the apportionment of liability cannot here be supported.

Finally, there ought not to be a finding of negligence against this company unless the scope of their duty is defined. Licensees in this tunnel may include children of tender years or old and crippled persons, and the character or status of the licensees ought to enter into the definition of the duty to take care. A common-sense definition of the duty would be that unless the premises are being used by this owner of this private property in an unreasonable manner, the licensee cannot complain.

H. G. Talbot, for the plaintiff, was not called on.

DENNING L.J. In Derbyshire there has been for well over a hundred years a railway line owned by the Clay Cross Co. We were told that George Stephenson himself made it. The company use it to carry limestone from their quarries at Crich down to Ambergate. It is a small gauge line, only 3 feet 3 inches wide, and is two and a half miles long. On that small line there are two tunnels. One of them, with which we are concerned, is only about 8 or 9 feet high, and it is just 66 yards long.

On February 12, 1953, the plaintiff was walking through the tunnel when she suddenly realized that a train was coming up behind her. She got down on to the ground to seek what safety she could, but unfortunately the train ran over one of her legs and cut it off. She now claims damages against the Clay Cross Co., saying that it was their fault.

If she were a trespasser on this railway, she would, of course, have no cause of action; but she says that the Clay Cross Co. had acquiesced for years in the villagers of Crich walking along this railway down to Ambergate and back. It was a short cut for them. The company had done nothing at all to show that they resented the villagers using it, and the villagers had in fact used it for years. The judge has found—and I think there can be no doubt—that she was what we call in law a licensee, not a trespasser who was unlawfully there, but a person who was permitted and allowed by the owners to be there, not for any matter in which they had an interest, but only for her own purposes. She was a licensee.

It has been urged before us that, as she was a licensee and not an invitee, the duty of the company and its servants is greatly affected: and that it is much less on that account. The judge did not take that view; he held that there was a duty on the servants of the company to take reasonable care in their operations, and he held that they had not taken that care.

[His Lordship considered the findings of the judge as set out above, said that the finding of negligence could not be disturbed, and continued:] Mr. Elwes stressed the fact that the plaintiff was only a licensee and urged that this was of special significance. I do not think so. The Law Reform Committee has recently recommended that the distinction between invitee and licensee should be abolished; but this result has already been virtually attained by the decisions of the courts. The classic distinction was that the invitor was liable for unusual dangers of which he knew or ought to know, whereas the licensor was only liable for concealed dangers of which he actually knew. This distinction has now been reduced to vanishing point. The decision of this court in *Hawkins* v. *Coulsdon and Purley Urban District Council* [1] shows that a licensor, as well as an invitor, is liable for unusual dangers of which he knew or ought to have known. The broken step in that case was not a concealed danger, but it was an unusual danger; the local authority did not know it was a danger, but they ought to have known it; and they were held liable. The duty of the occupier is nowadays simply to take reasonable care to see that the premises are reasonably safe for people lawfully coming on to them: and it makes no difference whether they are invitees or licensees. At any rate, the distinction has no relevance to cases such as the present where current operations are being carried out on the land. If a landowner is driving his car down his private drive and meets someone lawfully walking upon it, then he is under a duty to take reasonable care so as not to injure the walker; and his duty is the same no matter whether it is his gardener coming up with plants, a tradesman delivering goods, a friend coming to tea, or a flag seller seeking a charitable gift. That is made clear by the decision of this court in *Dunster* v. *Abbott*,[2] which was applied

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[1] [1954] 1 Q.B. 319; [1954] 1 All E.R. 97.

[2] [1954] 1 W.L.R. 58; [1953] 2 All E.R. 1572.

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by Finnemore J. very recently in *Slade* v. *Battersea and Putney Hospital Management Committee.*[3] So here it seems to me that the Clay Cross Co., in carrying on their operations, were under a duty to take reasonable care not to injure anybody lawfully walking upon the railway, and they failed in that duty. As the judge said: "I, therefore, hold that the defendants' servants "were guilty of negligence in exposing the plaintiff to a risk "which the defendants, their servants and agents were well "aware of, putting her in a position of great danger, and failing "to take the necessary precautions to prevent such danger "arising."

Mr. Elwes next relied on the maxim volenti non fit injuria. He said that the plaintiff must have known that it was dangerous to walk along this little tunnel and she must be taken voluntarily to have incurred the risk of danger from trains. He also said that that danger was an obvious one, and a licensee cannot complain of dangers which are obvious or known to him or her. On this matter Mr. Elwes very properly drew our attention to the decision of Asquith J. in *Dann* v. *Hamilton,*[4] where a passenger took a lift with the driver of a car who was obviously under the influence of drink. There was an accident due to the negligence of the driver, and it was said that the passenger had no cause of action against the driver because she had voluntarily incurred the risk. Asquith J. held that the maxim volenti non fit injuria had no application to the case; and he gave judgment in favour of the injured passenger. I must say that I agree with him. I know that the decision has in some quarters been criticized, but I would point out that Lord Asquith himself wrote a note in the Law Quarterly Review for July, 1953 (vol. 69, at p. 317), which explains what he decided. He wrote: "The criticisms " . . . were to the effect that even if the '*volenti*' doctrine did not "apply, there was here a cast iron defence on the ground of contributory negligence. I have since had the pleadings and my "notes exhumed, and they very clearly confirm my recollection "that contributory negligence was not pleaded. Not merely so, "but my notes show that I encouraged counsel for the defence to "ask for leave to amend by adding this plea, but he would not "be drawn: why, I have no idea. As the case has been a good "deal canvassed on the opposite assumption, I hope you will not "grudge the space for this not unimportant corrigendum." In so far as he decided that the doctrine of volenti did not apply,

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[3] [1955] 1 W.L.R. 207; [1955] 1 All E.R. 429.

[4] [1939] 1 K.B. 509; 55 T.L.R. 297; [1939] 1 All E.R. 59.

I think the decision was quite correct. In so far as he suggested that the plea of contributory negligence might have been available, I agree with him.

Applying that decision to this case, it seems to me that when this lady walked in the tunnel, although it may be said that she voluntarily took the risk of danger from the running of the railway in the ordinary and accustomed way, nevertheless she did not take the risk of negligence by the driver. Her knowledge of the danger is a factor in contributory negligence, but is not a bar to the action.

But is it?

Even in cases which concern the condition of premises, like *London Graving Dock Co. Ltd.* v. *Horton*,[5] which was mentioned to us, knowledge of the danger is only a bar where the party is free to act on it, so that his injury can be said to be due solely to his own fault. I tried to explain as much in *Greene* v. *Chelsea Borough Council*[6] and *Cuthbert* v. *Mason*.[7] Where knowledge of the danger is not such as to render the accident solely the fault of the injured party, then it is not a bar to the action but only a ground for reducing the damages.

So, here, the plaintiff's knowledge of danger is not a complete bar. It is a factor in contributory negligence. The judge pointed out that if she had been paying attention, she should have heard the train approaching, especially the diesel engine, which made a loud noise, and if she had looked back, she ought to have seen or realized that the train was coming. He found that she was guilty of contributory negligence because anyone having due regard for his or her own safety upon entering a tunnel would have paused and thought whether a train was coming. So she was at fault; and the consequence of that is that whereas in the old days she would have failed altogether, it is now a matter for reducing the damages to which she would otherwise be entitled. The judge put her responsibility at 40 per cent. and the company's at 60 per cent. Mr. Elwes has urged strongly before us that those proportions do not represent the right shares of responsibility; but we in this court always pay the greatest attention to the view of the judge who tried the case, heard the witnesses, and had all the circumstances before him. On the whole, this is not, I think, one of those cases where we can interfere with the proportions. In the result, I think that the judge was right on all points in his decision, and I would dismiss the appeal.

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[5] [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.

[6] [1954] 2 Q.B. 127; [1954] 2 All E.R. 318.

[7] Judgments of the Court of Appeal, No. 15, 1956.

BIRKETT L.J. I am entirely of the same opinion.

PARKER L.J. I also agree and would only add a few words in deference to Mr. Elwes's argument. The only point on which the judge has held the defendants liable in this case is that their driver, the driver of the train, was negligent in two respects, in that he did not whistle before entering the tunnel, and, in effect, that he was going too fast. On that issue it seems to me that the question of the relationship between the parties, licensor and licensee, is wholly immaterial except in this respect, to show that the plaintiff herself was lawfully on the land; and once the judge has found, as he did, that the driver well knew that people such as the plaintiff were used to going through this tunnel it seems to me that he owed a duty to such a person to take reasonable precautions before entering the tunnel; and, indeed, his employers felt the same, because the instructions to the men were to blow a whistle and to slow down; and when one realizes that the maximum speed of the train was 10 miles an hour, slowing down there is clearly slowing down to walking pace.

[His Lordship then dealt with the evidence as to the whistle and the speed of the train, and concluded:] I see no way in which the findings of the judge can be successfully challenged, and I think that he came to a right conclusion. On all other points I agree entirely with what my Lord has said.

Appeal dismissed.

Solicitors: *J. F. Coules & Co.; Sharpe, Pritchard & Co. for Bertram Mather & Co., Chesterfield.*

M. M. H.

C. C. C.

1956
Mar. 21, 22.

Devlin J.

REGINA *v.* MARTIN AND OTHERS.

Criminal Law—Aircraft—Offence on—Dangerous drugs—Possession of drugs on British aircraft outside United Kingdom—Possession of drugs only an offence in England—Whether an offence on a British aircraft—Dangerous Drugs Regulations, 1953 (*S.I.* 1953, *No.* 499), *reg.* 3—*Civil Aviation Act,* 1949 (12, 13 & 14 *Geo.* 6, *c.* 67), *s.* 62.

The defendants were charged with being in possession of raw opium on British aircraft flying between Bahrein and Singapore, contrary to regulation 3 of the Dangerous Drugs Regulations, 1953.[1] On a motion to quash the indictment on the ground that the English courts had no jurisdiction to try the offences alleged in it, the prosecution conceded that regulation 3 only created an offence if the act constituting the offence was committed in England, but alleged that by virtue of section 62 of the Civil Aviation Act, 1949,[2] any act, which if done in England would be an offence, was an offence if committed on a British aircraft:—

Held, that section 62 did not create offences, but provided the place where an act which was already an offence if committed on a British aircraft outside England might be tried; and that as it was conceded that regulation 3 only created an offence if the act constituting the offence were committed in England, the defendants had committed no offence under English law by being in possession of opium outside Great Britain.

Trial on indictment.

Matthew Martin, John William Marns and George Bellamy were charged with a conspiracy to contravene the provisions of the Dangerous Drugs Act, 1951, and the Dangerous Drugs Regulations, 1953, in that on divers days between January 1, 1954, and August 18, 1955, in Hertfordshire, Middlesex and elsewhere abroad, and on British aircraft, they conspired together with certain named persons and other persons unknown to contravene the provisions of the Act and Regulations by being in possession of raw opium on British aircraft. The accused men were also charged in separate counts with being in unlawful possession of drugs on specified British aircraft contrary to regulation 3.

Before the defendants pleaded to the charges, their counsel made pleas to the jurisdiction, for the purposes of which it was agreed that the defendants were in possession of raw opium somewhere between Bahrein and Singapore.

John Foster Q.C. and *Alan Campbell* for Martin. For the purposes of this plea to the jurisdiction it is conceded that the possession of raw opium was somewhere between Bahrein and Singapore, in other words, outside the United Kingdom. The Dangerous Drugs Act, 1951, and regulation 3 of the Dangerous Drugs Regulations, 1953, have no extraterritorial effect, for present purposes, because regulation 3 only creates an offence if possession of the drugs is in the United Kingdom. The prosecution have conceded that regulation 3 does not, in itself, make it an offence to have possession of drugs in a British aircraft abroad, but they contend that whenever an act, which is an offence under English law if committed in England, is committed on a British aircraft anywhere in the world, by virtue of section 62 of the Civil Aviation Act, 1949, it is an offence under English law which can be tried in this country.

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[1] Dangerous Drugs Regulations, 1953, reg. 3: "A person shall not be "in possession of a drug unless he "is generally so authorized. . . ."

[2] Civil Aviation Act, 1949, s. 62: "(1) Any offence whatever committed "on a British aircraft shall, for the "purpose of conferring jurisdiction, "be deemed to have been committed "in any place where the offender may "for the time being be."

[DEVLIN J. In effect the prosecution say that section 62 makes British aircraft a part of Great Britain?]

Yes, for this purpose. If the prosecution case is right it would have a very far-reaching effect. One could take the example of a Bahrein doctor, boarding a British aeroplane with opium in his possession to travel from Bahrein to Singapore. He might be allowed to carry opium by the laws of Bahrein and Singapore and yet would be committing an offence under English law for which he could be tried here if he landed in England at any time.

The only question to be decided in the present case is whether section 62 of the Civil Aviation Act, 1949, is a venue-creating section or an offence-creating section. Section 62 has to be divided into two parts. One first has to find the words creating the offence, and for that purpose one does not look at section 62, but at the Act creating the offence. In the present case it would be necessary to find that it is an offence to have possession of drugs on a British aircraft abroad. One has to find the creation of the offence before considering venue.

[DEVLIN J. Suppose a man commits a murder in a British aircraft when flying above France, is that an offence against English law?]

Yes, if he is a British subject, but not if he is a foreigner.

[DEVLIN J. Then you would ask if the offender is a British subject. If he is, then section 62 gives the English court jurisdiction?]

Yes. Jurisdiction means power to try the offender from the point of view of venue. If it is sought to make actions committed abroad offences under English law, then special words have to be used. Section 3 (3) of the Treachery Act, 1940, makes it an offence to commit treachery on a British aircraft, showing that specific words are used where it is desired to create an offence for an act committed abroad. That section can be construed either as creating an offence by making an act of treason committed on any ship or aircraft punishable in England, or, alternatively, if the offence has already been created, it provides where it should be tried. If the prosecution were right, section 3 (3) of the Act of 1940 would be unnecessary, in view of section 14 of the Air Navigation Act, 1920, which was the appropriate provision relating to offences in aircraft at that time, and is now replaced by sections 60 and 62 of the Civil Aviation Act, 1949. Section 60 gives venue to offences created by the Act itself and section 62 applies venue outside the Act to offences which are already extraterritorial offences. Section 60 is clearly a venue section, and the terms of section 62 are so similar that it must also apply to venue.

Section 62 should be construed in the light of the historical background of the venue sections. There are a number of statutes in criminal law, some of which create new offences and some merely create offences abroad, which show the distinction between offence-creating and venue-creating words. Section 9 of the Offences against the Person Act, 1861, is a striking example, because the section first creates the offence and then proceeds to provide for venue: for other examples see Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., pp. 29–33, 42. Offences within the Admiralty jurisdiction included offences committed abroad: Archbold, p. 33: see also section 115 of the Larceny Act, 1861, section 72 of the Malicious Damage Act, 1861, section 50 of the Forgery Act, 1861, section 68 of the Offences against the Person Act, 1861. Where it is intended to give extraterritorial effect, special care is taken in framing the section. If the prosecution are right, then every single offence committed on a British aircraft by a British subject or a foreigner, and including misdemeanors, would be offences with extraterritorial effect which could be tried in this country.

[DEVLIN J. Would it mean that if you had a drink on an aircraft outside licensing hours that it would be an offence?]

That happens to be an exception.

[DEVLIN J. Apart from exceptional cases, all the criminal offences which could be committed in this country would be offences on British aircraft under section 62 of the Act of 1949?]

Yes.

[DEVLIN J. I note that an offence committed outside any territory is not an offence unless there is specific jurisdiction that applies to sea and the air.]

Yes, there is only a limited application of the criminal law to ships, and yet the prosecution suggest that the whole of it applies to aeroplanes. [Reference was made to sections 686 and 687 of the Merchant Shipping Act, 1894.] The prosecution contend that not only British subjects, but also all foreigners, are amenable to the whole of the criminal law of England when on board a British aircraft, and the latter for acts which might be legal under their own law. The general rule of international law does not admit that offences committed by foreigners outside the jurisdiction of a particular country can be tried within that jurisdiction. It would be a quite untenable position which would cause great hardship. The principle as stated by Lord Russell C.J. in *Reg.* v. *Jameson*[3] has been a cardinal principle of English law.

[DEVLIN J. If you were right one could do anything one liked on an aircraft, unless the statute creating the offence applied it extraterritorially?]

Yes, but the Minister could deal with that position by exercising his powers under Part VI of the Act of 1949. He could make Orders in Council under section 59. For example, to deal with the case of a common assault the Minister could make an order under section 8 (2) (*h*), which is a section to which Part VI of the Act applies, for the safety of the aircraft.

[DEVLIN J. But that is only incidental. What about a confidence trick? Broadly speaking, unless section 62 has the meaning for which the prosecution contend, there is no provision which would enable English criminal law to be applied to an aeroplane in the same way as to a ship.]

I agree that the policy of the Act is for the regulation and safety of aircraft, and it would be strange if section 62 had a wider effect.

[DEVLIN J. Unless an Order in Council is made under the Act of 1949, which was primarily enacted for a different purpose, is there anything on which section 62 could operate on your construction?]

Section 62 would operate where any act is made an offence under English law if committed anywhere outside Great Britain. It would apply to offences under the Treachery Act, 1940, possibly to murder and definitely to bigamy. In America marriages do take place in the air. The section would also apply to unlawful oaths.

[DEVLIN J. I should not think that the legislature meant the section to apply solely to unlawful oaths and bigamy.]

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[3] [1896] 2 Q.B. 425, 430.

If one tries to construe section 60 in the same way as the prosecution wish to construe section 62 of the Act of 1949 it will be seen that it cannot be done. Section 60 cannot be creating offences and must be solely a venue section, and yet it has in it the same words as appear in section 62; accordingly, it would appear that section 62 can only be a venue section.

S. C. Silkin, for Marns, adopted the argument on behalf of Martin. Section 60 imports one idea only, namely, that of venue. If the prosecution are right on the construction of section 62, that section would import two ideas in the same language, namely, creating an offence and venue. Having regard to the remarkable difference contended for in meaning, where similar words are used, one would have to ask whether the legislature intended by a side wind to import such a wide meaning into section 62. Bearing in mind the history and draftsmanship already referred to, the similar wording in section 60 and the fact that section 62 is a penal section, the court should construe section 62 in favour of the defendants.

A. Melford Stevenson Q.C., *Alan Orr* and *W. A. B. Forbes*, for Bellamy, adopted the previous arguments. There is a presumption that a statute is not to be construed to give extra-territorial jurisdiction unless expressly stated: Maxwell on Interpretation of Statutes, 10th ed., p. 145. A carefully observed distinction between the creation of an offence and venue will be noticed particularly in the criminal Acts of 1861, which show that Parliament recognized that presumption. Another general presumption is that the legislature does not intend to exceed its jurisdiction: Maxwell, p. 148. When it is seen how carefully the legislature in other Acts have preserved the distinction between offence-creating and venue, the difficulties in construing this ambiguous section against the defendants are overwhelming. It is not reasonable or possible to extract from the language of section 62 the proposition for which the prosecution contends.

T. Christmas Humphreys and *E. J. P. Cussen* for the Crown. The words of section 62, which are wide and simple, must be construed as applying British criminal law to aircraft. The section means that an aeroplane is to be treated as part of the United Kingdom. It is conceded that there might be difficulties in administering the law.

With regard to the hypothetical doctor in Bahrein, if he wanted to carry drugs he could always obtain a licence: section 21 of the Dangerous Drugs Act, 1951. Putting it in general terms, some law must apply to aeroplanes. The defendants are doing something contrary to our laws; despite the Drugs Act, the Regulations, etc., they are openly and flagrantly dealing with drugs.

[DEVLIN J. If foreign laws do not apply to British aeroplanes, and I doubt if they do, then a man wounding with attempt to murder on an aeroplane commits no offence.]

An aeroplane passes over many countries in a number of hours and there must be some indication as to where offences are to be tried. If an offender is found here, he can be tried here. It was submitted for the defence that one must have an act which is an offence if committed abroad. The defence is trying to close a gap which does not exist. One has the offence and section 62 provides that it may be tried here.

[DEVLIN J. The question is what is meant by "offence." What about a confidence trick; that is not an offence unless committed in England. Really you say that "offence" means any act which if done in England would be an offence.]

McNair on the Law of the Air, 2nd ed., pp. 117–121, takes the view that this is a matter of difficulty but suggests that the Crown's interpretation is right. In Halsbury's Laws of England, 3rd ed., vol. 5, p. 17, note (*f*), the editors set out their view but say "see, however, McNair's Law of the Air," supporting the wider interpretation. [Reference was also made to Shawcross and Beaumont on Air Law, 2nd ed., para. 92, pp. 76 et seq.]

Foster Q.C. replied.

DEVLIN J. The prisoners at the bar are arraigned upon an indictment which alleges that they committed offences against the Dangerous Drugs Act, 1951, and the Dangerous Drugs Regulations, 1953, which were made under the Act. The gist of these offences is that as persons who were employed as part of the personnel on British aircraft they took raw opium from Bahrein to Singapore.

I do not know, I have not been told, and it is not relevant that I should be told, whether the export of opium was prohibited from Bahrein or the import into Singapore. I daresay it was, since it is alleged by the prosecution that these men were given considerable sums of money for the services they performed in secretly carrying the opium. But for the purposes of this case that is quite irrelevant, because these men are not arraigned upon an indictment which charges them with offences against the law of Bahrein or the law of Singapore, but one which charges them with offences against the law of England. For this purpose, therefore, I must assume, though in fact the assumption makes no difference, that the export and import of opium would not be contrary to any foreign law. The offence alleged under English law is a breach of regulation 3 of the Dangerous Drugs Regulations, 1953, which provides: "A person shall not be in "possession of a drug unless he is generally so authorized. . . ." "A drug" includes raw opium, and regulation 3 is in that part of the regulations which is intended to control raw opium. It is not suggested that any of these men had any authorization to be in possession of the drug. Accordingly, the offence against each is simply this, as it is stated in the indictment, that on a specified British aircraft he was in unlawful possession of raw opium.

It is conceded by the prosecution that that regulation by itself applies only to acts committed in England; that is to say, only to the possession of raw opium in England. It is also conceded that, if necessary, the indictment could be framed more specifically to show that none of these British aircraft were in England at the time when the accused were alleged to be in unlawful possession of the opium. Accordingly, counsel for the three defendants have all moved that I should quash the indictment on the ground that this court has no jurisdiction to try the offences alleged in it. Mr. Humphreys, for the prosecution, conceded that if this regulation stood by itself that would be so, but he relies on section 62 of the Civil Aviation Act, 1949, as giving the court jurisdiction to try this offence. The whole question which arises now for my determination is whether that section, on its true interpretation, does have the effect which the prosecution contends for it. Section 62 is in the "General" part of the Civil Aviation Act, the marginal note is "Jurisdiction," and the section reads as follows: "(1) Any offence whatever committed on a "British aircraft shall, for the purpose of conferring jurisdiction, "be deemed to have been committed in any place where the "offender may for the time being be." That is to say, that if an offence is committed on a British aircraft then, if the aircraft lands down at London Airport and the prisoner is there arrested, the offence can be deemed to have been committed in London. That is the effect which the prosecution contend that the section has.

Counsel for the defence submit that the section is dealing only with the question of venue, or with the question of what court has jurisdiction to try an offence that has already been committed. If the prosecution are right, they say, then this section must be construed as a section which itself creates the offence. That must be, the defence submit, the construction

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which has to be put upon it if the prosecution is to succeed in its argument, because without this section it is conceded that there is no offence. The true meaning of the section, however, the defence allege, is that it is only dealing with matters that are already offences by virtue either of some other statute or of some other provision of the law; if an act is already an offence, then what the section is doing is simply providing for the venue. Thus (according to the defence) the section is really only procedural, saying: "Here is an offence committed in a British "aircraft; the British aircraft may be anywhere in the air at "the time when the offence is committed—it may be over "several countries, it may be over the high seas, it may be over "several counties in England—and the question is bound to "arise what is the proper venue for the trial—which courts have "jurisdiction." That is the problem and the only problem, the defence say, which this section is designed to solve.

That is the issue, therefore, between the parties. Stated in that way it becomes a point of very great importance far exceeding the importance of the enforcement of the Dangerous Drugs Regulations, important though they may be. The prosecution submit that, if this section has not the meaning which they contend that it has, there is no law on board a British aircraft; that those who are in it may do what they like with impunity so far as English law is concerned; because, with a few exceptions, section 62 is the only section which applies the British criminal law to acts done in British aircraft. They point to the inconvenience of any construction which in effect means that people can behave in British aircraft with impunity. The defence, on the other hand, say that if the prosecution are right it applies the whole of the British criminal law to British aircraft; that means that, irrespective of his nationality, anybody who happens to be on board the aircraft, even perhaps when it is grounded for several days, has to be treated as if he had committed an act in this country and so might unwittingly offend against numerous regulations which now govern our lives about which he cannot possibly know. For example, the defence submit that if a foreign doctor were taking a drug from one point to another in a British aircraft abroad—perhaps for some urgent medical purpose—yet he would commit an offence in this country because, although a duly qualified medical practitioner in his own country, he would not be duly qualified here and so not "generally authorized" to have possession of the drug.

These are the contentions on each side. It is, as I say, a point of considerable importance and one which does not seem to have been decided before. It is not very satisfactory that it has to be decided now on motion, and summarily, because jurors and witnesses are waiting to proceed with the trial, if trial there is to be; and that if it is decided in favour of the defendants, no appeal lies. That is not a very satisfactory position, but it is part of the necessary procedure; therefore I must decide it, summarily, having had much assistance from the arguments of the counsel in the case.

I think that it is convenient, before I look again at section 62, that I should consider the general background of the law against which, as it were, it has to be construed. I have had a number of statutes cited to me which show what the position is in relation to offences that are committed abroad on foreign land. I think that the position is conveniently summarized in Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., at p. 28, where it is said: "No British subject can be tried under "English law for an offence committed on land abroad, unless "there is a statutory provision to the contrary . . . A foreigner "is not liable under English law for an offence committed on "land abroad. . . ." That is the position under common law. Various statutes have modified the general principle so that English criminal law may apply to acts done abroad in specific cases. I shall refer to one which I can take as an example, the case of murder. Section 9 of the Offences against the Person Act, 1861, provides: "Where any murder or manslaughter shall "be committed on land out of the United Kingdom, whether "within the Queen's dominions or without, and whether the "person killed were a subject of Her Majesty or not, every offence "committed by any subject of Her Majesty, in respect of any "such case, whether the same shall amount to the offence of "murder or of manslaughter, or of being accessory to murder or "manslaughter, may be dealt with, inquired of, tried, determined "and punished in any county or place in England . . . in which "such person shall be apprehended or be in custody, in the same "manner in all respects as if such offence had been actually "committed in that county or place." Generally speaking, even where the jurisdiction is extended by statute, it applies only to British subjects, whereas the contention of the prosecution here is, and must be, that it applies to every person in a British aircraft whether he be a British subject or not.

How far does English criminal law apply to British ships which are outside this country? The position is considered generally, and sufficiently for my purpose, in Archbold, 33rd ed., at p. 33: "By the Offences at Sea Act, 1536, s. 1, it was provided "that treasons, felonies, robberies, murders and confederacies "thereafter committed in or upon the sea, or in any other haven, "river, creek, or place, whereon the admiral had or pretended "to have jurisdiction should be inquired of, etc., in such shores "and places in the realm as should be limited for that purpose "by the King's commission." The author goes on to set out various other statutes which have applied the same method of trial principally to cases of piracy and so forth. Moreover, all the criminal law consolidation Acts of 1861 made provision for offences which were within the jurisdiction of the Admiralty to be tried as if they had been committed on land in England and to be dealt with in any county or place at which the offender should be apprehended or be in custody in the same manner as if the offence had been committed in that county or place. I have not noticed any case in which a statutory regulation of this sort has been applied to a British ship.

This is the position so far as foreign land is concerned and so far as British ships abroad are concerned. The similar problems that arise in relation to British aircraft are all left to be settled by section 62. The prosecution submit that, unless the section is given the meaning which they contend it should have, it is virtually meaningless: for, they say, at common law no act done outside England is an offence against English law. Statutes which provide for giving the court jurisdiction in the case of crimes committed on land abroad are immaterial because, unless the aircraft happened to be touched down at the time, the act is not committed on land. The defence largely accept this; but they say that there are one or two statutes which are phrased widely enough to create an offence to which on their construction of it section 62 could apply. The Treachery Act, 1940, is one which makes specific provision for an offence committed on British aircraft. The earlier part of the Act lays down the offence of treachery, and section 4 provides: "This Act shall apply to "anything done—. . . (c) by any person in the United Kingdom, "or in any British ship or aircraft, not being a Dominion ship "or aircraft." Section 3 (3) provides: "A person charged with "an offence against this Act who is in the United Kingdom may, "whether or not the offence was committed in the United King- "dom or in a British ship or aircraft, be taken in custody to any "county or place in the United Kingdom, and may be proceeded "against, indicted, tried and punished in any county or place in "the United Kingdom, as if the offence had been committed in "that county or place, and for all purposes incidental to or consequential on the trial or punishment of the offence it shall be "deemed to have been committed in that county or place: . . ."

Other examples are further to seek: Mr. Foster cited, as I think the best he could do, the case of bigamy, which is not a very convincing one since bigamy is hardly a crime which is likely to be committed in the course of an air flight. Section 57 of the Offences against the Person Act, 1861, provides: "Whosoever, "being married, shall marry any other person, during the life of "the former husband or wife, whether the second marriage shall "have taken place in England or Ireland or elsewhere, shall be "guilty of felony . . ." and there the word "elsewhere" might well be wide enough to cover the offence committed in a British aircraft. I see no reason why it should not be, and indeed I see no reason, although the point has not been argued, why offences under regulation 2 of the Dangerous Drugs Regulations should not be ones to which, on any view, section 62 applies. Regulation 2 (1) provides: "A person shall not supply or procure, or "offer to supply or procure, to or for any person, including "himself, whether in Great Britain or elsewhere, or advertise "for sale, a drug . . ." The prosecution say that, apart from these few statutes, section 62 is the only enactment that can make a criminal act done in the air an offence. Accordingly, the prosecution say that section 62 must be given a construction which is wide enough to make it an offence-creating section. Since it starts off by apparently assuming that the act to be considered is an offence before the words of the section operate on it—because it begins by saying: "Any offence whatever com"mitted on a British aircraft"—the prosecution say the word "offence" must be construed as if it read "any act which if "done in England would be an offence." No doubt so wide a construction would sustain the prosecution's submission.

The defence say that that construction is not permissible. They point to the large number of statutes (some of which I have already cited) which make that sort of provision in specific terms, saying that an act committed in such-and-such a place should be treated in the same way as if it had been an act committed in England or in the place where the man was apprehended or tried. Those are the sort of words, Mr. Foster submitted, that are used by the legislature when it intends to achieve the result the prosecution contend for here; such words are not present in section 62. As another example, the defence refer to the Criminal

Justice Act, 1948, section 31 (1) of which provides: "Any British "subject employed under His Majesty's Government in the "United Kingdom in the service of the Crown who commits, in a "foreign country, when acting or purporting to act in the course "of his employment, any offence which, if committed in England, "would be punishable on indictment, shall be guilty of an offence "of the same nature, and subject to the same punishment, as if "the offence has been committed in England." The defence also pray in aid in support of their narrower construction the provisions of section 60 of the Civil Aviation Act, 1949, which provides: "Any offence under any enactment to which this Part "of this Act applies or under an Order in Council or regulation "made under either any such enactment or this Part of this Act "shall, for the purpose of conferring jurisdiction, be deemed to "have been committed in any place where the offender may "for the time being be." Here are similar words to those in section 62 used, the defence submit, in a section which clearly is not doing more than providing for venue, because the offence there is not an offence that is created by the section; it is specified as an offence which is created under any enactment to which this part of the Act applies or under any Order in Council or regulation.

Those are the contentions on either side, and both sides, as I say, place great reliance on the inconvenience, and worse than inconvenience, that would be caused if the view on the other side were accepted. It is most unsatisfactory if there is to be complete lawlessness on British aircraft, but, on the other hand, it can hardly be satisfactory if a foreigner travelling from one place to another, thousands of miles from England, is to be held liable for infringing regulations about which he cannot possibly have any knowledge at all. Where inconvenience is alleged on both sides, the only safe course, and perhaps the only safe course in any event, is to look at the words of the statute and apply a strict grammatical construction. I say "strict" construction, because this is a statute which, in the submission of the prosecution, is itself creating a criminal offence where no criminal offence would otherwise be, and also because it is a statute which is, if the prosecution are right, stretching the jurisdiction of the English courts to acts done abroad by persons who are not subjects of the Queen. Both those considerations make it proper that a strict construction should be applied to the words of the statute.

In my judgment, if the prosecution are to succeed, it can only be if a very free construction is applied to the words of the statute. It can only be if, as I say, in lieu of the words: "Any "offence whatever," there is read: "Any act which if done in "England would be an offence." That is a free construction. It is not a construction which emerges from the grammar of the Act and it is not one which I find myself willing to accept. I think that the Act appears to postulate this, that one must inquire, before one operates the section at all, whether any offence has been committed; if it has been, then the section determines the place where it should be tried. But if it is to be conceded, as it is in this case, that apart from the section no offence has been committed, I think it must follow that the section has no operation at all.

Having reached this conclusion, I wish to make it clear that I do not think that it necessarily means that any act that is committed on board a British aircraft cannot be made subject to British criminal law. I propose to explain the distinction that I have in mind, not only because I must satisfy myself that this case does not fall within it, but also because it would be most undesirable if it were thought it necessarily followed from this decision that anything could be done on board a British aircraft with impunity.

There is a distinction, in my judgment, between what I may call the nature of an offence and the ingredients which have to be present before an offence is committed at all on the one hand, and, on the other hand, the question of what courts are to assume or are to be given jurisdiction when the offence has been committed. I can perhaps explain the distinction more easily in relation to civil law than in relation to criminal law. Take the case of trespass that is committed to land abroad. There is no doubt that the courts of England will not exercise jurisdiction over such a trespass. But if one examines the cases, which I have not had time to do, one may well find that the grounds on which the English court refrains is not that the act is not a trespass, but that it is not a trespass over which the court will exercise jurisdiction. What the court is saying in effect is: "Yes, "certainly this is a trespass, but because international comity "requires it, the court will curtail the jurisdiction which it might "otherwise exercise." If that is the right view, then the position is that a trespass has been committed, the offence is there, but the court will not assume jurisdiction over it.

A similar distinction may be made in criminal law. In a crime that is the creation of statute, one must look to the terms of the statute for a definition of its nature; and if the effect of the statute is limited territorially, then so is the nature of the crime. But crimes conceived by the common law—which are mostly offences against the moral law, such as murder and theft—are not thought of as having territorial limits. They are universal offences. Murder is a crime whether done in France or in England; but if done in France the English courts would not under the common law assume jurisdiction to punish it because that would be an infringement of French sovereignty. It looks as if this principle was at the back of the application of English law to English ships on the high seas. It will have been observed from the terms of the old statute which I quoted—the statute of 1536—that it does not say that certain things which if done in England would be treasons, felonies, robberies, and so on, were also to be treasons, felonies, robberies, and so on, if committed upon a British ship. It was assuming they were felonies and that the only question was whether the Admiral had jurisdiction over them.

A distinction may therefore be drawn between the sort of situation where a crime is to be regarded as an offence wherever it is committed and the sort of statutory offence which is created only in relation to a particular place. Murders are offences against the moral law in the broad sense wherever they are committed. But if a statute provides that something may not be done in a public house, it is an offence only if it is committed in a public house. No one would treat it as an offence everywhere and say that the court assumes jurisdiction over it only if it is committed in a public house. In the same way, if a statute provides that such-and-such a thing shall be an offence if done in the County of Middlesex, it is an offence only in the County of Middlesex and not an offence if committed anywhere else: again it is not a question of assuming jurisdiction only if it is done in Middlesex; it is a case of the statute that creates the offence making it an offence only within limits. Where limits are imposed as to place or in some other form, the limits prescribe the nature of the offence. Broadly speaking one can, therefore, distinguish between offences which, as I say, are offences against the moral law, and to be regarded as wrong wherever they are committed, and offences which are merely breaches of regulations which are made for the better order or government of a particular place such as a public house, or a particular area such as the County of Middlesex, or a particular country such as England.

Now with regard to the offence charged here—whatever may be the position in regard to other statutory offences—it is perfectly clear that this offence is an offence only if it is done in England. As I say, apart from section 62 that is conceded, and it is abundantly plain from the provisions of regulation 3 itself. In the first place it has to be construed in contrast to regulation 2, which I have already read, which makes certain things an offence whether in Great Britain or elsewhere. Secondly, it is quite plain that if one looks at the terms of the general authorization under regulation 3 they are terms which contemplate that the section is to have effect simply in Britain. The persons who are allowed to be in possession of it are all persons one would normally expect to be in Britain and who can get their qualifications for being in possession of it only in Britain. Duly qualified medical practitioners must mean those duly qualified according to English law; veterinary surgeons are specifically set out and must mean those who are registered under the Veterinary Surgeons Act, 1948, and authorized sellers of poisons must mean authorized by some English law and so on. One can take it down the list to show that it is abundantly plain, as it is indeed conceded, that this by its nature is only an offence if the act done takes place in England. That is the concession that is made, and very properly made, for the contrary could not be argued.

In my judgment, that concession is decisive in this case. Under section 62 one must examine, first of all, the act alleged; one must proceed on the basis that the section does not itself create any offence. One must examine the act alleged and ask oneself before applying the section: "Is this act an offence committed on a British aircraft?" In the case of theft the answer might well be yes; for theft in the eyes of the law may be an offence wherever it is done and, therefore, an offence on board a British aircraft. Then the only question is whether the English courts are to have jurisdiction over an act which is an offence wherever it is done; and section 62 provides that they are. But if one finds in the case of a statutory offence, as here, that it is an offence only if it is done in Great Britain, then it is not an offence if it is committed on a British aircraft that is not in Great Britain, and consequently the section does not apply at all.

I am not saying that section 62 applies to offences at common law. I have not heard that point argued and it may have to be argued hereafter. What I am saying is that section 62 does not apply to a statutory offence which by the terms of the statute that creates it is local and not universal in character.

I am saying also that whereas Mr. Humphreys has properly conceded in this case that by the regulation which creates the

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offence here charged it is an offence only if done in Great Britain, it does not necessarily follow that the prosecution will make a similar concession in respect of offences such as theft and murder, and so on, that may arise hereafter and may have to be considered. I wish, therefore, to make it clear that the decision which I have given is a decision which is to be regarded as applying to the particular offence which I have had to consider under the Dangerous Drugs Regulations.

For the reasons which I have given I shall quash the indictment. I do not do so on the grounds that I have no jurisdiction to try it, because I think that this court has got jurisdiction to try offences that are committed on British aircraft, and I think that is the effect of section 62. But I do so on the ground that this is not an offence committed on a British aircraft, because the regulation creating the offence does not apply to acts done on British aircraft outside England. Accordingly, it follows that the depositions do not show or disclose that any criminal offence has been committed, and therefore the committal is bad, and on that ground I quash the indictment.

Indictment quashed.

Solicitors: *Director of Public Prosecutions; Theodore Goddard & Co.; Lewis, Silkin & Partners; J. H. Milner & Son.*

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Diplock J.

C. A.

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Singleton, Morris and Romer L.JJ.

O'CONNOR *v.* ISAACS AND OTHERS.

[1954 O. No. 2153.]

Justices—Action against—False imprisonment—Maintenance order made without jurisdiction—Committal to prison for non-payment of arrears—Trespass—Whether action maintainable against justices for false imprisonment and money paid under the order—Effect of statute on common law rights—Accrual of cause of action—Whether date of false imprisonment or discharge of order—Limitation Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 21—*Justices Protection Act,* 1848 (11 *&* 12 *Vict. c.* 44), *s.* 2.
Limitation of Action—Public authority. Causation.

The plaintiff's wife took out a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, alleging that the plaintiff had been guilty of persistent cruelty and seeking a separation and maintenance order. At the hearing the justices made an order that, although the allegation of persistent cruelty was not proved, the plaintiff was to pay his wife maintenance. The plaintiff fell into arrears with his payments and, as a result, on three occasions, the last in 1945, was imprisoned. The amount payable under the original order was varied from time to time. On October 6, 1954, the Divisional Court of the Probate, Divorce and Admiralty Division discharged the original order and the variation orders. On December 21, 1954, the plaintiff issued a writ against the justices who made the orders, claiming damages for false imprisonment and in respect of the money paid by him to his wife under the orders. The defendants relied, inter alia, on section 21 of the Limitation Act, 1939. It was conceded that as the matrimonial offence charged before the justices had not been proved, the justices had no jurisdiction to make the maintenance order; and that applied also to the later variations of the order and committal orders:—

Held, (1) that, even if the proviso to section 2 of the Justices Protection Act, 1848,[1] had the effect of requiring an order to be quashed before action could be brought, the causes of action for false imprisonment were not dependent for their existence on the quashing of any order, but arose at the time of the imprisonment; accordingly, the action for false imprisonment was statute barred.

Haylock v. *Sparke* (1853) 1 E. & B. 471 applied.

Per Romer L.J. The meaning and effect of the proviso to section 2 must be ascertained with regard to the provisions of the Act as a whole. The effect of section 7 appears to be that while an action can properly be commenced in respect of an invalid conviction before the conviction is quashed, a judge can set aside the proceedings if the defendant does not obtain the quashing of the conviction. This seems to show that in the contemplation of Parliament the right of action—i.e., the right to sue—precedes the setting aside of the conviction.

Per Singleton and Morris L.JJ. (Romer L.J. dubitante). The words "or order" should not be read into the proviso to section 2 (making it read "no such action shall be brought . . . until after

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[1] Justices Protection Act, 1848, s. 2: "For any act done by a justice "of the peace in a matter of which by "law he has not jurisdiction, or in "which he shall have exceeded his "jurisdiction, any person injured "thereby, or by any act done under "any conviction or order made or "warrant issued by such justice in any "such matter, may maintain an action "against such justice in the same "form and in the same case as he "might have done before the passing "of this Act, without making any "allegation in his declaration that the "act complained of was done mali-"ciously, and without reasonable and "probable cause: Provided neverthe-"less, that no such action shall be "brought for any thing done under "such conviction or order until after "such conviction shall have been "quashed, either upon appeal, or upon "application to Her Majesty's Court "of Queen's Bench; nor shall any "such action be brought for any thing "done under any such warrant which "shall have been issued by such jus-"tice to procure the appearance of "such party, and which shall have "been followed by a conviction or "order in the same matter, until after "such conviction or order shall have "been so quashed as aforesaid. . . ."

"such conviction *or order* shall have been quashed"). Accordingly the section did not require the orders in question to be quashed before action could be brought.

(2) That the effect of the Limitation Act, 1939,[2] and the Law Reform (Limitation of Actions) Act, 1954, was to bar any claim for damages for the money paid by the plaintiff more than a year before the passing of the Act of 1954, and that, as regards later payments, no injury was caused to the plaintiff when the original and variation orders were made by the justices without jurisdiction; loss or injury only occurred when he paid moneys which he was under no legal liability to pay and such payments were not "any "act done" by the justices within section 2 of the Act of 1848 entitling the plaintiff to maintain an action against them; that, apart from the statute, no right of action against the justices existed at common law in respect of the money paid out and, therefore, the plaintiff's claim failed.

Per Morris L.J. If the order made without jurisdiction is one for the payment of money it need not be obeyed. Appropriate steps can be taken to quash it or to reverse it on appeal. It does not seem to me that if those steps are omitted a claim for damages can later be presented against the justices based merely on the fact that they made an order requiring payment to be effected.

Polley v. *Fordham* [1904] 2 K.B. 345; 20 T.L.R. 435 applied.
Decision of Diplock J. affirmed.

ACTION.

On August 5, 1941, the wife of the plaintiff, John O'Connor, took out a summons in the Petty Sessional Division of Kingston-upon-Thames, Surrey, under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, alleging that the plaintiff had been guilty of persistent cruelty towards her and applying for a separation and maintenance order. On August 18, at the hearing of the summons, the justices found that the charge of persistent cruelty was not proved, but they made an order for maintenance. The order, dated August 18, 1941, and signed "G. Isaacs," stated: "Annie O'Connor . . . wife of John "O'Connor . . . (hereinafter called the defendant) having made "a complaint that the defendant has been guilty of persistent "cruelty to her, his said wife. And the defendant having

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[2] Limitation Act, 1939, s. 21 (1): "No action shall be brought "against any person for any act done "in pursuance, or execution, or in-"tended execution of any Act of "Parliament, or of any public duty "or authority, or in respect of any "neglect or default in the execution "of any such Act, duty or authority, "unless it is commenced before the "expiration of one year from the "date on which the cause of action "accrued: Provided that where the "act, neglect or default is a con-"tinuing one, no cause of action in "respect thereof shall be deemed to "have accrued, for the purposes of this "subsection, until the act, neglect or "default has ceased."

" appeared and persistent cruelty not having been proved, but " the said defendant having consented to an order, it is this day " ordered and adjudged that the said Annie O'Connor be no " longer bound to cohabit with the defendant: and that the " defendant do pay to J. Sackville Bell, collecting officer, . . . " for the use of his said wife the weekly sum of £1 5s., the first of " such payments to be made on Monday, August 25, 1941, and " the subsequent payments to be made on every Monday in each " succeeding week until this order be altered, varied or discharged " in due course of law: and that the defendant do pay for the " costs of the court, the sum of 10s. 6d."

On April 14, 1942, the wife, having given birth to a child, issued a summons to vary the order by increasing the weekly amount. On April 27, the justices made an order stating that the original order should be varied as follows: " the amount of " the weekly payment shall be increased from £1 5s. to £1 15s. " (being 10s. extra for the child) as from May 4, 1942." On the same day the justices made an order committing the plaintiff to prison for one month for having failed to pay £8 due under the original order. The committal order was suspended while instalments of arrears were paid, but the plaintiff failed to pay the arrears and was imprisoned on June 18, 1942. He was released on June 29, having paid £5 in respect of the arrears. On March 7, 1944, the justices made an order for committal for three months in respect of arrears amounting to £100 5s. The order was again suspended, but on July 28, 1944, the plaintiff, having failed to pay the instalments, was imprisoned for three months until October 27. On May 23, 1945, another order for committal for three months in respect of arrears amounting to £53 10s. was made, but suspended until July 20, 1945, when the plaintiff was imprisoned until October 19.

On June 26, 1951, the wife took out a summons for a variation of the order by increasing the sum payable. On July 9, the justices reduced the amount payable for the wife to £1 from £1 5s. On August 2, 1951, the wife took out another summons for variation, and on August 13 the justices increased the amount payable for the child from 10s. to 15s. On November 30, 1953, the wife took out a further summons for variation, and on January 4, 1954, the justices made an order increasing the amount to £2 a week in all (being £1 for the wife and £1 for the child). The plaintiff, having taken legal advice, on March 17, 1954, took out a summons applying for an order or declaration that the order of August 18, 1941, was made without jurisdiction and that that order and the variation orders were null and void. At the hearing on April 5, the justices held that, although the order of August 18, 1941, was bad for want of jurisdiction, they had no jurisdiction either inherent or under section 7 of the Summary Jurisdiction (Married Women) Act, 1895, to entertain the application. On October 6, 1954, the Divisional Court of the Probate, Divorce and Admiralty Division, having given the plaintiff leave to withdraw his appeal against the order of April 5, 1954, and having extended the time for him to appeal against all the other orders, made an order discharging the order of August 18, 1941, and each of the variation orders. The order of the Divisional Court recorded that the husband undertook not to reopen the matter as to any payments made under the orders. Diplock J. accepted that that undertaking, which was made in proceedings between the husband and wife, was an undertaking not to reopen the matters with the wife.

On December 21, 1954, the plaintiff issued the writ in the present action against 14 of the justices of the peace of the Petty Sessional Division of Kingston-upon-Thames, Surrey, namely, (1) George Alfred Isaacs, (2) Frederick Lees McGhee, (3) Elsie Ledbrooke Hale, (4) Frank Stanley Wagner, (5) Henry George Reynolds, (6) Leslie Janet Haldane, (7) Frank Buckingham, (8) Sybil Dorothea Howard, (9) Ernest William Walters, (10) Hubert Saville Knapp, (11) Miriam Jeffries Tinniswood, (12) Evan Thomas Rees, (13) Amy Woodgate and (14) Walter Stanley Thomas. The first three defendants made the original order of August 18, 1941. The first variation order, dated April 27, 1942, was made by the third and fourth defendants. The subsequent variation orders were made by the other defendants, according to whichever of them on the rota happened to be sitting when the applications were made. The fourth defendant died after the writ was issued and the action was discontinued against him and the twelfth and the thirteenth defendants. By his writ, the plaintiff claimed damages for false imprisonment and for acts done by the defendants without jurisdiction while sitting as justices of the peace. In his statement of claim the plaintiff set out the sums paid under the various orders, amounting to nearly £1,000. He also alleged as special damages loss of wages during his imprisonment and for periods thereafter, which were agreed at £200. The defendants, by their defence, pleaded, inter alia, that the action was barred by section 21 (1) of the Limitation Act, 1939.

It was conceded that, on the finding that persistent cruelty had not been proved, the justices had no jurisdiction to make an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, it being a condition precedent to their right to make an order that the husband should be guilty of one of the matrimonial offences set out in section 4 of the Summary Jurisdiction (Married Women) Act, 1895, one of which was persistent cruelty, which was relied upon in the present case, but not proved. It was further conceded that the justices had no jurisdiction to order maintenance for the child, there having been no custody order granted to the wife.

The plaintiff also denied that he had consented to the making of the maintenance order of August 18, 1941.

N. R. Fox-Andrews Q.C. and *R. L. Bayne-Powell* for the plaintiff. This case depends on sections 1, 2, 3 and 13 of the Justices Protection Act, 1848. The first three defendants, the justices who, without jurisdiction, made the original order of August 18, 1941, and the first variation order for non-compliance with which the plaintiff was wrongfully imprisoned, are liable to the plaintiff by reason of section 2. Under section 3 the justices liable to a person wrongfully imprisoned are not those who sign the committal order, but those who sign the original order as a result of which the committal order is made. The limitation in section 13, which provides that only nominal damages can be recovered, does not operate at all unless it is proved that the complainant was guilty of the offence of which he had been convicted or that he was liable to pay the sum which he was ordered to pay, neither of which applies to the present plaintiff.

The justices who made the variation orders were also acting without jurisdiction since the basis of the variation orders was an order made without jurisdiction. It is clear from the proviso to section 2 that no action can be brought for any wrong done under an order until after such conviction or order has been quashed; accordingly, the plea that the action is barred by section 21 of the Limitation Act, 1939, will not avail the defendants because by reason of the proviso to section 2 of the Act of 1848 no action could be commenced by the plaintiff until after October 6, 1954, when the Divisional Court of the Probate, Divorce and Admiralty Division quashed the orders. [Reference was made to *Board of Trade* v. *Cayzer, Irvine & Co. Ltd.*,[3] *Musurus Bey* v. *Gadban*[4] and *Read* v. *Brown*.[5]]

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[3] [1927] A.C. 610; 43 T.L.R. 625.

[4] [1894] 2 Q.B. 352; 10 T.L.R. 493.

[5] (1888) 22 Q.B.D. 128; 5 T.L.R. 97.

If the action in respect of the false imprisonment is statute barred, that defence would not apply to the weekly payments made under the variation orders, which continued until 1954. The payments made by the plaintiff to his wife and child are by the express provisions of section 13 of the Act of 1848 recoverable against the justices as special damages. That flows from the Act, in so far as the Act gives a right of recovery by express terms, and as the Act gives that right there would have existed a similar right at common law without the statute. The defendants can only avoid that position by showing that the plaintiff was liable by law to pay those sums. If a wife chooses to leave her husband without just cause he is not liable to make payments to her or for the child, no custody order having been made. Therefore the payments which the plaintiff was ordered to pay by the justices without jurisdiction are sums which he is entitled to recover from them. In addition, he is entitled to a sum for wages lost during the period of his wrongful imprisonment.

G. G. Baker Q.C. and *David Wacher* for the defendants. Three main points are raised by the defence: (1) that no cause of action lies against any of the justices who varied the original order, namely, justices 4 to 14; (2) section 21 of the Limitation Act, 1939, bars the whole action except in respect of anything which happened within 12 months before the writ was issued; (3) damages.

The Act of 1848 is a justices protection Act, not an Act for giving rights of action to citizens against justices.

[DIPLOCK J. Is there any case before 1848 where a fine has been returned when a conviction has been quashed?]

No, but section 13, which is a difficulty in the way of the defendants, suggests that it might be the case. One must not confuse a common law cause of action with a cause of action under the statute. In a common law cause of action part of the damage suffered by the plaintiff might be costs which he had had to pay or, if execution had been levied, the money which he had had to pay to recover his goods; such items would be recoverable under section 13. In the present case the plaintiff on one occasion paid £5 to buy himself out of prison; that sum clearly flowed directly from the false imprisonment—the action of trespass against his person. Apart from those examples it is difficult to see what else is contemplated when section 13 refers to the "parcel of damages." The section is not one which gives a cause of action. The passage in Halsbury's Laws of England, 2nd ed., vol. 21. p. 543, para. 961, which tends to show that the action could be maintained, is inaccurate. [Reference was made to *Norton* v. *Monckton.*[6]]

The justices who varied the order are not liable because the order was only voidable, and, until some action was taken to avoid it by quashing, it was a subsisting and conclusive order on which those justices were bound to act. Such an order is conclusive until set aside: *Reg.* v. *Swindon Justices*[7] and *Rex* v. *Lancashire Justices, Ex parte Tyrer.*[8] While there is a subsisting order the justices have no power to go behind it on a summons to vary.

It is clear that the justices who signed the committal orders are completely protected by section 3 of the Act of 1848, and it is submitted that that protection extends to the justices who made the variation orders. Although section 3 only refers specifically to a warrant of distress or commitment, since there was no power to vary an order in 1848, the protection there given to justices should not be strictly limited to the words of the statute, but should include subsequent acts on the original order such as variation orders. By applying the principles in the bicycle cases of *Corkery* v. *Carpenter,*[9] *Taylor* v. *Goodwin*[10] and *Cannan* v. *Earl of Abingdon*[11] to the construction of section 3, the words in that section are wide enough to include variation orders.

The action against the justices who varied the order is clearly framed as a claim for damages for acts done by them without jurisdiction while sitting as justices of the peace. To succeed, the plaintiff must establish that there is some statutory right of action against justices, because the defendants will satisfy the court that there is no right of action at common law. The Act of 1848 was in truth and in fact a protection Act; it did not give or make any new cause of action. The Act draws a distinction between a justice who acts within his jurisdiction, and who is protected in respect of whatever order he may make, however ludicrous, so long as he acts without malice, and a justice who acts without jurisdiction and makes an order, which may be completely in accordance with common sense, but for which he is not protected because he has no jurisdiction. It is an odd distinction and one which can only be explained by the historical development of the law.

[6] (1895) 43 W.R. 350.

[7] (1878) 42 J.P. 407.

[8] [1925] 1 K.B. 200; 41 T.L.R. 103.

[9] [1951] 1 K.B. 102; 66 T.L.R. (Pt. 2) 333; [1950] 2 All E.R. 745.

[10] (1879) 4 Q.B.D. 228.

[11] [1900] 2 Q.B. 66; 16 T.L.R. 318.

The Act of 1751, 24 Geo. 2, c. 44, the first Act to give protection to justices, gave a very limited protection in respect of acts done by a justice in the execution of his office. The Act of 1803, 43 Geo. 3, c. 141, extending that protection, provided that where justices, acting by virtue or under an Act of Parliament, wrongfully convicted a person, that person in an action against the justices had to prove that the conviction was made maliciously or without reasonable and probable cause. Section 1 of the Act of 1848 substantially reproduces the existing law relating to justices acting within their jurisdiction. In section 2 there appears for the first time a protection, and it is submitted that it is no more than a protection, for a justice of the peace acting without jurisdiction. The wording of the proviso to section 2 that prior to the action being brought the "conviction shall have "been quashed" does not appear to require that an "order" should be quashed. Section 2 did not give any new right of action to the subject; it is a protection to the justices. There is no case which establishes that a person has a right of action founded purely on a statute against justices acting without jurisdiction. There is authority and certainly obiter dicta to the contrary.

A justice who acted without jurisdiction was liable at common law to an action for trespass: *Massey* v. *Johnson* [12]; *Gray* v. *Cookson* [13]; *Brittain* v. *Kinnaird* [14]; *Cave* v. *Mountain*,[15] and *Reg.* v. *Bolton*.[16] Following the Act of 1848, Hill J. states in *Sommerville* v. *Mirehouse* [17] that the order of the justices has to be acted on before there could be an action for trespass. Section 2 deals only with actions for trespass because that is the only cause of action which lies at common law against justices acting without jurisdiction: *per* Erle C.J. in *Pedley* v. *Davis*.[18] Wills J. said in *Polley* v. *Fordham* [19] that he had never heard of a cause of action against justices for making an order without jurisdiction, which is what is alleged by the present plaintiff. The defendants' case is that as soon as there is a trespass there is a cause of action, but if there is no trespass there is no cause of action. [Reference was made to *Palmer* v. *Crone*.[20]]

If a person is ordered to pay money and does in fact pay it, that is an approbation of the order. Only if he leaves himself in a position where he is liable to imprisonment or seizure for non-payment does the cause of action arise. It is not until there is an actual trespass that the action is maintainable against the justices, although he might have a remedy against the person to whom he paid the money for money paid under a mistake of fact.

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[12] (1809) 12 East 67.

[13] (1812) 16 East 13.

[14] (1819) 1 Brod. & Bing. 432.

[15] (1840) 1 Man. & G. 257.

[16] (1841) 1 Q.B. 66.

[17] (1860) 1 B. & S. 652, 657.

[18] (1861) 10 C.B.N.S. 492, 511.

[19] [1904] 2 K.B. 345, 348; 20 T.L.R. 435.

[20] [1927] 1 K.B. 804; 43 T.L.R. 265.

The second head of argument is that the claim is barred by section 21 of the Limitation Act, 1939. It is conceded that if the cause of action accrued only on October 6, 1954, when the Divisional Court quashed the orders, then section 21 is no defence. Time runs from the date when the cause of action arises and not from the date when an act, which has to be done before the action can be brought, occurs. The requirement of conviction quashed is a disability, like infancy, and disabilities did not apply to public authorities prior to the Act of 1939: *Jacobs* v. *London County Council.*[21] The requirement of conviction quashed is really a disability, not to the accrual of an action, but to the action, which has already accrued, being brought. That is made clear by the words of section 2, " no such action shall be brought," which presume that the cause of action lies. Probably the correct way of looking at the requirement that the conviction must be quashed is that it provides a defence to a justice if the conviction has not been quashed.

Up to the Act of 1939 the cases concerning public authorities ran on different lines from those concerning ordinary individuals. The cause of action would have accrued, but the trial could not have taken place until the conviction was quashed because otherwise there would have been a complete defence. It would be strange if the Act of 1939 intended to take away from justices a protection which they had previously enjoyed. [Reference was made to *Polley* v. *Fordham* (*No.* 2).[22]] Some assistance is derived from section 9 of the Act of 1848 which, in providing that no action shall be commenced without one month's notice being given to the justices, uses the words " cause of action," thus imposing another limitation on the bringing of the action, the cause of action already subsisting. Whatever the definition of " cause of action," the present case cannot be brought within the *Cayzer, Irvine*[23] and *Musurus Bey*[24] line of authorities, where there is no cause of action until after a certain act is performed, in the former case the arbitration. Here there is a cause of action, with either a prohibition against proceeding with

[21] [1935] 1 K.B. 67; 51 T.L.R. 16.

[22] (1904) 91 L.T. 525.

[23] [1927] A.C. 610.

[24] [1894] 2 Q.B. 352.

it, or a defence. Reliance is placed on *Coburn* v. *Colledge*[25] and *Monckton* v. *Payne*.[26]

On the question of damages, if the defence under section 21 of the Limitation Act, 1939, fails, then it is conceded that the plaintiff can recover from the first three justices all the damage that flows from the trespass, namely, the false imprisonment; but they cannot be liable for the sums of money paid by the plaintiff to his wife either before or after his imprisonment. It has been conceded that those defendants are liable for the £5 the plaintiff paid to be released from prison on the first occasion. If the court came to the conclusion that payments made by the plaintiff to his wife were to be included in his "parcel of the "damages" under section 13, the question cannot be resolved by awarding the plaintiff the same sum which he wrongly paid to his wife. The matter must be considered as general damages, subject to the consideration that under certain circumstances he might have been liable to pay something for his wife and child. [Reference was made to *Jinks* v. *Jinks*.[27]]

Fox-Andrews Q.C. in reply. The Act of 1848 was not passed to protect justices from all actions but only to protect them from vexatious actions, i.e., those which ought not to be permitted to be brought as a matter of public policy. The Act should be considered as a whole. It distinguishes very sharply between acts done within the jurisdiction, for which a justice is not liable unless he acted maliciously, and acts done without jurisdiction. In the first part of section 2, which deals with acts done without jurisdiction, the words "conviction," "order" and "warrant" are different things and have their own meaning. The fact that later in the section one finds "conviction" not followed by "order" is a matter which has to be considered in the light of these words, which provide a pointer to the whole section. The circumstances in which a complainant is to be able to exercise his right to legal redress are expressly dealt with in the proviso. The proviso, coupled with the meanings given to "cause of "action," indicates that this case is governed by the *Cayzer, Irvine* case[28] and not by the other line of authorities, and that no action shall lie on a conviction or order until such conviction is quashed. In the light of the judgment of Lord Esher M.R. in *Read* v. *Brown*,[29] if the plaintiff had served a statement of claim which omitted to state that these orders had been quashed, it is submitted that it would have been struck out as disclosing no cause of action. Quashing is a condition precedent and not a kind of disability. The sections of the Act must be read together and one must look at the whole scheme of the Act, which is to draw a distinction between acts done within or without jurisdiction. That is a logical distinction. If a person elects to take up a position in which he is clothed with authority by law over other members of the community, then he assumes an obligation to use that authority properly. If he does an act as a result of which a subject may be injured in his personal property or rights or in some other way put in jeopardy in a legal sense, and if the person in authority brings about that result by going outside the limits of his jurisdiction, then prima facie, on the basis of ordinary common sense and ethics, he would be regarded as attracting liability for that act. It is submitted that morally that is correct and that at common law the position would not be any different.

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[25] [1897] 1 Q.B. 702; 13 T.L.R. 321.

[26] [1899] 2 Q.B. 603; 15 T.L.R. 531.

[27] [1936] 3 All E.R. 1051.

[28] [1927] A.C. 610.

[29] 22 Q.B.D. 128, 131.

The effect of the Act in respect of acts done within the jurisdiction confirms and is declaratory of the common law, incorporating into it a requirement that before proceedings can be successfully taken the conviction has to be quashed. If the Act took away or modified common law rights in any way, the courts would be anxious to read the section as narrowly as possible and would be anxious to secure that existing common law rights should only be invaded to the minimum extent necessary for the interpretation of the statute. In *Gray* v. *Cookson*,[30] and later in *Brittain* v. *Kinnaird*,[31] the courts made it clear that the protection afforded to justices acting on a previous conviction or order was only available where the conviction or order was good and regular on its face. The order of August 18, 1941, on its face, is bad in law, and therefore the justices making the variation orders are not protected. Although Wills J. in *Polley* v. *Fordham* [32] said that he had never heard of an action against justices for making an order against a person without jurisdiction, he qualified that statement by adding,[32] " If the order is not followed " by consequences against the individual, it comes to nothing." While at that time there may not have been any proceedings in which justices had been sued for damages where an order had been made, it does not follow that that was not a competent form of proceedings. Where a court, having power to order imprisonment, makes an order, the breach of which is likely to send a

[30] 16 East 13.

[31] 1 Brod. & Bing. 432.

[32] [1904] 2 K.B. 345, 348.

person to prison, that amounts in the absence of jurisdiction to "constructive trespass" to the person.

The fact that the justices who varied the order did not examine the original order, but assumed that it was correct, does not exonerate them. They are liable to the plaintiff for the money he paid because a failure to comply with the orders carried the risk of imprisonment, and his compliance with the terms of the order was not made by reason of any legal obligation on the plaintiff, but under a species of duress in order to avoid imprisonment. Since the original order was bad in law on its face, the subsequent orders cannot themselves be good in law. If that is right, then the sums paid under the various orders are recoverable by virtue of the provisions of the Act of 1848, and the terms of imprisonment resulting from the orders require an award of damages in respect of orders made by the justices which were followed by imprisonment. *Norton* v. *Monckton*[33] is relied on for the proposition that the sums paid are recoverable.

[Diplock J. The defendants agree that if there is a trespass and one has to pay money to bring that trespass to an end, then one can recover, as special damage, what has been paid out, but a trespass must first be shown before one can recover money as special damage.]

If that were right, it would present difficulties. If a group of persons clothed by law with authority to deal with an individual brought before them says: "You have to pay £x to A, your wife, "and if you don't you will go to prison," and the individual in respect of whom the direction is made pays £x to A, when in fact A is not entitled to receive the money, then, by the ordinary application of the principles of English law, that gives rise to an action on the case giving rise to damages.

[Diplock J. If malice is present there is a cause of action against a justice acting with or without jurisdiction, but malice appears to have been regarded as a necessary element to the cases. At the moment I find some difficulty in seeing your cause of action purely at common law without prejudice to any argument on the statute.]

In conformity with the dictates of ethics and common sense, if a person in a position of authority can be said to have forced another to pay money to a third person to whom he did not owe it, the injuria is the act done without any legal basis which gives rise to damage. No authority can be found for that submission and it is probably a new point. The fact that a person pays

[33] 43 W.R. 350.

money under a threat, whether the threat is made bona fide or maliciously, does not mean that the person is approving the payment. Approbation means approval.

Apart from the common law aspect, sections 2 and 13 of the Act of 1848, on their true construction, show that the plaintiff is expressly given the right to recover as damages the sums paid to his wife, because they were payments made under an order within the meaning of section 13, unless the defendants can prove, which they have failed to do, any of the matters of defence set out in the latter part of the section. Section 13 speaks of the right to recover, except in certain circumstances, and in the absence of those circumstances that right exists. Those rights are envisaged by section 2 and have been proved in the present case.

[DIPLOCK J. Section 13 assumes that there were cases at common law where a plaintiff could recover a penalty or money levied under a conviction or order. If there were any such cases at common law, would you contend that section 13 extended them to a wider field than before?]

No, one is thrown back on the position as it would have been at common law in such circumstances.

With regard to the argument that the order is conclusive until set aside, the answer is that the document is bad on its face, and therefore void, and one would not have to go behind it in order to discover that it was bad.

The defendants have conceded that they cannot be protected for what happened in the 12 months preceding the issue of the writ, and, accordingly, that if the action accrued when the conviction was quashed they were not protected. The requirement of section 2 that the conviction must be quashed is a condition precedent to the accrual of the action and time runs from that date; it is a similar requirement to that found in the *Cayzer, Irvine* case,[34] the principles of which apply to the present case. *Coburn* v. *Colledge*,[35] on which the defendants rely, was not cited in the *Musurus Bey* case,[36] but it was referred to in the *Cayzer, Irvine* case,[37] but did not affect the decision. The distinction between the *Cayzer, Irvine*[37] and *Musurus Bey*[38] line of cases and those on which the defendants rely is very narrow, but it may be that in the latter it was wholly within the power of the plaintiff to act alone, while in the present case it was not within his power to quash the order, which could only be done by the court. On that distinction and on general principles *Cayzer's* case [39] applies. [Reference was also made to *Jacobs* v. *London County Council*,[40] *Monckton* v. *Payne* [41] and *Fuller* v. *Sutton*.[42]]

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[34] [1927] A.C. 610.
[35] [1897] 1 Q.B. 702.
[36] [1894] 2 Q.B. 352.
[37] [1927] A.C. 610.
[38] [1894] 2 Q.B. 352.

It is admitted that, if they are not protected by section 21 of the Limitation Act, 1939, there is no defence to a claim for false imprisonment against the first three justices. Accordingly, they are liable for all damages recoverable in any event. The other justices are liable for any damages resulting from the orders which they made, and there is no reason to distinguish between justices 4 to 14. Those who ordered a reduction nevertheless ordered the plaintiff to pay that reduced amount and therefore were liable for those reduced amounts.

On the question of quantum, the plaintiff is entitled to his loss of wages during the period of his imprisonment, apart from general damages. The plaintiff's damages cannot be restricted to nominal damages under section 13 since he was not liable at law to make payments to his wife for herself and the child at any of the material dates. As part of his general damages, the plaintiff is entitled to a sum equal to the sums paid by him to his wife. There is no reason to reduce that sum in any way since the plaintiff was not liable to maintain his wife or in the absence of a custody order to pay to the wife for the maintenance of the child. [Reference was made to *Jones* v. *Guardians of Newtown and Llanidloes*.[43]]

DIPLOCK J. This is an action brought by John O'Connor against a number of magistrates who are members of the Kingston-upon-Thames Petty Sessional Division of Surrey, in respect of acts done by them over a period of some 13 years, allegedly without jurisdiction, and arising out of summary matrimonial proceedings instituted by the plaintiff's wife, Annie O'Connor, by a summons dated August 5, 1941. It is an important case: important not only to the plaintiff who, as a result of these proceedings, spent 193 days in prison, to which, it is common ground, he was not liable, but important also from the public point of view, because the plaintiff seeks to make personally liable a number of magistrates as a result of a perfectly bona fide mistake of law made by them, or by three of them, or, more accurately, by their clerk when the original proceedings were brought in August, 1941. The question of law which I have to consider is whether all or any of those magistrates are personally liable to the plaintiff in respect of his imprisonment and in respect of sums of money which he paid to his wife in consequence of the order and orders made by them. [His Lordship referred to the facts and continued:]

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[39] [1927] A.C. 610.

[40] [1935] 1 K.B. 67.

[41] [1899] 2 Q.B. 603.

[42] (1864) 28 J.P. 391.

[43] [1920] 3 K.B. 381; 36 T.L.R. 758.

The original order of August 18, 1941, in itself, shows that there was no jurisdiction. It is an order which is bad on its face, and, as such, it ceases to have the advantage which orders, although made without jurisdiction, but good on their face, have, namely, that they are to be treated as valid until they have been set aside. Authority for that proposition is to be found in a number of old cases, of which I would refer to *Crepps* v. *Durden*,[1] which was a case under the Sunday Observance Act, 1677, where a baker was convicted and was awarded three penalties of 5s. each for carrying on the trade of a baker on a Sunday, those offences being alleged to be committed on the same Sunday. The court held that under the Act there could be only one offence on a Sunday, because it was carrying on the trade. The conviction on its face showing three offences, they held that it was bad on the face of it. Lord Mansfield said[2]: "it is illegal on the face of it; and therefore, "as was very rightly admitted by the counsel for the defendant "in the argument, if put upon the record by way of plea, would "have been bad, and on demurrer must have been so adjudged."

The next case to similar effect is *Pease* v. *Chaytor*.[3] That was a church rate case, where a distress warrant had been issued against the plaintiff for non-payment of church rate. Under the procedure available the plaintiff had disputed the rate, and the magistrates had in those circumstances no jurisdiction to issue a warrant of distress for the rate while the matter was under dispute. There again it was held, there being a bona fide dispute as to the church rate, and it so appearing on the record, that the magistrates were not protected.

The third case to which I desire to refer is *Houlden* v. *Smith*.[4] This was not a case against magistrates, but against a county court judge, and it is of some importance, in relation to some matters I shall have to discuss later, to note that the principle as respects magistrates is no different from the principle as respects a county court judge. That was a case against a defendant who was judge of the county court of Lincolnshire at

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[1] (1777) 2 Cowp. 640.

[2] Ibid. 647.

[3] (1861) 1 B. & S. 658.

[4] (1850) 14 Q.B. 841.

Spilsby, and the reason why he had no jurisdiction was that the plaintiff did not live within the jurisdiction of the county court. The headnote sets out the decision simply[5]: "A judge of a "court of record is answerable in an action for an act done by his "command, when he has no jurisdiction and is not misinformed "as to the facts on which jurisdiction depends." Then it sets out the facts about the plaintiff living at Cambridge and not at Spilsby, and goes on[5]: "Afterwards, while the plaintiff still "dwelt and carried on business at Cambridge, a judgment "summons was issued by order of the judge of the Spilsby "court, under section 98, calling upon the plaintiff to be "examined as to his estate and effects; and, the plaintiff not "appearing, the judge, knowing the facts, but believing, never"theless, that he had authority, made an order that the plaintiff "should be committed for his contempt. Held, that the com"mitment was without jurisdiction; and that, as the judge had "ordered it under a mistake of the law and not of the facts, he "was liable in trespass."

The law, therefore, appears to me to be clear that where a magistrate or any judge of an inferior court assumes jurisdiction where he has no jurisdiction as a result of a mistake of law, he is liable in trespass for acts done as a result of that erroneous assumption of jurisdiction, and if his mistake of law appears upon the face of the record itself, the setting aside of the order is not a condition precedent to the action at common law. In the present case it appears upon the face of the record that the magistrates made the order without jurisdiction.

The order purports to be made by consent: the words, "the "said defendant having consented to an order," are inserted. Whether the order was assented to by the defendant or not is an issue of fact, and there is some slight dispute as to it. I do not think, as will appear, that it is relevant whether the order was made by consent or not. I do not think that is relevant to the question of liability, though it might be a matter to be considered on the question of damages. It is, however, I think, desirable that I should make my findings of fact upon that matter.

The consent, if it were given, was given now something like 14½ years ago. The magistrates do not pretend to remember what happened on that occasion, and, indeed, I should have been surprised if any of them had been able to come in the box and say that he or she did remember. The plaintiff gave a detailed account of what he said happened, which involved a suggestion that the magistrates had retired, I think it was three times, before eventually saying to him that they had decided to make an order and could he afford to pay 25s. a week. I do not accept that story in full. I am satisfied that the magistrates thought there had been a consent to the order as recorded in the magistrates' book, which was produced, and in the order itself. I think that what happened was that the magistrates having heard the case, and taking the view, sitting in a domestic court, that they should do their best for the parties to get a common-sense solution which would avoid wrecking the marriage, they expressed the view that the plaintiff ought to pay something to his wife, and I think he did tell them that he would pay 25s. a week, but it does not follow from that by any means that he consented to such payment being the subject of an order such as the magistrates in fact made. I think it is necessary to draw attention to what the nature and effect of such an order is.

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[5] 14 Q.B. 841.

The order is made under the Summary Jurisdiction (Married Women) Act, 1895, as subsequently amended, and it is provided by section 9 of that Act: "The payment of any sum of money "directed to be paid by any order under this Act may be enforced "in the same manner as the payment of money is enforced under "an order of affiliation."

I turn next to the Bastardy Laws Amendment Act, 1872, section 4 of which, as amended, provides for the making of an order for the support of a bastard child, and entitles the justices in petty session, "to make an order on the putative father for "the payment to the mother of the bastard child, or to any "person who may be appointed to have the custody of such "child . . . of a sum of money weekly . . . for the maintenance "and education of the child . . ." Then it goes on: "and if "at any time after the expiration of fourteen clear days from "the making of such order as aforesaid it be made to appear to "any one justice, upon oath or affirmation, that any sum to be "paid in pursuance of such order has not been paid, such "justice may, by warrant under his hand and seal, cause such "putative father to be brought before any two justices, and in "case such putative father neglect or refuse to make payment "of the sums due from him under such order, or since any "commitment for disobedience to such order as hereinafter "provided, together with the costs attending such warrant. "apprehension, and bringing up of such putative father, such "two justices may, by warrant under their hands and seals, "direct the sum so appearing to be due, together with such "costs, to be recovered by distress and sale of the goods and "chattels of such putative father, and may order such putative "father to be detained and kept in safe custody until return can "be conveniently made to such warrant of distress, unless he "give sufficient security, by way of recognizance or otherwise, "to the satisfaction of such justices, for his appearance before "two justices on the day which may be appointed for the return "of such warrant of distress, such day not being more than seven "days from the time of taking any such security; but if upon "the return of such warrant, or if by the admission of such "putative father, it appear that no sufficient distress can be had, "then any such two justices may, if they see fit, by warrant "under their hands and seals, cause such putative father to be "committed to the common gaol or house of correction of the "county, city, borough, or place where they have jurisdiction, "there to remain, without bail or mainprize, for any term not "exceeding three calendar months. . . ."

So the method of enforcement laid down by the Act is by distress or, in the absence of sufficient distress, by sending the defendant who does not pay to gaol. Incidentally, that section does, I think, solve the problem on which Mr. Bell gave evidence of the practice of the court, that the imprisonment wipes out the liability for the arrears in respect of which the imprisonment is imposed, because the power of the justices to issue a distress warrant or a commitment is in respect of "the sums due from "him under such order, or since any commitment for disobedience "to such order." So that the power of enforcement only exists in respect of sums which have fallen due since the last commitment under the order.

If one turns next to section 54 of the Summary Jurisdiction Act, 1879, one finds that the method of recovering sums due under a bastardy order is assimilated to that of the method of recovering fines imposed by the magistrates. Section 5 of the Act of 1879 provides a scale of imprisonment for non-payment of fines. A distinction is drawn in that Act between the method of recovering fines and of recovering sums ordered to be paid by the magistrates in the exercise of their civil jurisdiction which becomes a civil debt. A payment of a sum due under a bastardy order is not, however, a civil debt, but falls into the category of fines. It is, therefore, only recoverable in the special method laid down, and consequently when the sanction for recovering it has disappeared, because you can only recover in respect of sums which have fallen due since the last committal order, the liability, it seems to me, also disappears.

What is important about that is the nature of the sanction. The order made by the magistrates was an order which imported those sanctions, namely, a liability to distress and imprisonment if the sums made payable under the order were not in fact paid. I am quite satisfied that the plaintiff never agreed to pay the sum in a manner which would import sanctions of that kind. I therefore find as a fact that although he may have expressed his willingness to pay his wife 25s. a week, he did not consent to an order which would involve sanctions of that kind being imposed upon him in the event of non-payment.

As I have said, in my view, as a matter of law, the question whether he consented or not is irrelevant on the question of liability. He could not confer upon the magistrates jurisdiction by consent to make an order of this kind. Furthermore, as to damages, it does not seem to me to be a relevant consideration whether he expressed his willingness to pay his wife 25s. a week at that time or not. In so far as it was an agreement with the magistrates to pay that sum, it must, I think, have been a nudum pactum, for there was no consideration. If it were alleged to be an agreement with his wife to pay that sum, it would appear equally, in the circumstances at that time, to be a nudum pactum because he was not at that point in any way failing to maintain her.

That mistake made by the magistrates who sat on August 18, 1941, is the original error on which this action is based. Quite apart from the initial lack of jurisdiction because no matrimonial offence had been committed, it seems to me that there was a further lack of jurisdiction in making the order of April 27, 1942, for a payment to the child, no order having been made for the custody of the child, although the order itself is in a slightly ambiguous form.

[His Lordship stated the subsequent history as set out above and continued:] A number of difficult issues of law are raised. First, what (if any) cause or causes of action are there against the defendants, or any of them? Secondly, against which defendant or defendants does each such cause of action lie? Thirdly, which (if any) of such causes of action is barred by section 21 of the Limitation Act, 1939? Fourthly, to what damages (if any) is the plaintiff entitled?

I will deal first with the issue as to cause or causes of action. The damages claimed by the plaintiff are under two heads. The first is damages for false imprisonment, which is an action of trespass to the person. Under this head the plaintiff claims general damages and loss of wages during the time of his imprisonment, a figure which was agreed at £200. The second head under which damages are claimed is for money paid in obedience to the order or orders of the court made without jurisdiction. He claims to recover from the magistrates the sums which he paid to his wife through the collecting officer of the court in obedience to the order or orders.

Starting with the year 1751 by the Act 24 Geo. 2, c. 44, protection in gradually increasing degrees has been given to magistrates acting, or purporting to act, in the exercise of their functions. The original protection was extended in 1803 by the Act 43 Geo. 3, c. 141, and finally by the Justices Protection Act, 1848, which in so far as it is unrepealed governs the statutory position today. I shall have to look at these Acts, and particularly the Act of 1848, in some detail later, but I say now, in anticipation of that examination of the Acts, that it is, in my view, necessary to consider first what the position was at common law, quite apart from any statutory protection. It was in that connexion that I mentioned earlier *Houlden* v. *Smith*,[6] which was the county court case where statutory protection does not apply.

At common law a sharp distinction was drawn between a magistrate who acted within and one who acted outside his jurisdiction. A magistrate who acted outside his jurisdiction had no protection. He was in the same position as any other person. If he, or persons acting under his orders, committed a tort he could be sued.

When one is considering the common law position it is always a good rule to fly first to the 3rd edition of Bullen and Leake on Precedents of Pleadings, and there one will find at page 345 a count against justices for imprisonment. It is perhaps of some interest to note the way in which it is framed: "That the "defendants were justices of the peace in and for the county "of ——, and the defendants purporting and assuming to act "as such justices, but without any jurisdiction or authority in "that behalf, caused the plaintiff to be assaulted and imprisoned, "and to be kept and detained in custody until payment by him "of a sum of £——, which the defendants had adjudged the "plaintiff to pay under and by virtue of a certain conviction "before them, made by them without any jurisdiction or

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[6] 14 Q.B. 841.

"authority in that behalf, and which said conviction was afterwards quashed in due form of law upon the appeal of the "plaintiff against the same; whereby the plaintiff was compelled to pay the said sum of £—— in order to liberate himself "from the said imprisonment and custody, and was also put to "great costs and charges in and about appealing against the "said conviction, and procuring the same to be quashed." It will be noticed that this is a claim founded in trespass.

At page 346 the authors then refer to further counts: "count against a justice of the peace for a malicious conviction. "Against a justice of the peace for maliciously procuring the "plaintiff to be arrested on a charge of assault and committing "him for trial. Count against justices for seizing plaintiff's "goods under a distress warrant for church rates after notice to "dispute the validity of the rate." I pause to note that the authors of Bullen and Leake deal in that passage with two kinds of action: a count for trespass of the person (the one that I have just cited) and a count for seizing the plaintiff's goods (which is in fact *Pease* v. *Chaytor*[7]) which is trespass to goods; and then two counts, one for malicious conviction and the other for malicious arrest.

Bullen and Leake is supported by a number of early reports, the first of which in order of date is *Morgan* v. *Hughes*.[8] That was an action brought against a magistrate for committing the plaintiff without jurisdiction to gaol in what today, I think, would be called proceedings preliminary to indictment. The actual details of the case do not matter, but the judgment of Buller J. is an important one, I think, for the purposes of this case. The count which was put was a count for[9] "falsely, "unlawfully, wilfully, wrongfully, injuriously, maliciously, and "without any charge or accusation having been made," committing the plaintiff to gaol. It was argued that this should have been a count in trespass, the magistrate having acted without jurisdiction, and it was so held by the court.

Buller J. says this[10]: "The distinction between the actions "of trespass and case has long been settled in the manner "mentioned by my brother Ashhurst. The gravamen in the "present case is, that the defendant personally took and arrested "the plaintiff illegally, and imprisoned him; this is false "imprisonment, and is an immediate injury to the person of the "plaintiff. It is stated on the record, that the warrant was

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[7] 1 B. & S. 658.

[8] (1788) 2 Term Rep. 225.

[9] Ibid. 226.

[10] Ibid. 231.

"illegally granted, and it never was doubted but that in such "a case trespass was the proper remedy." Then he goes on to discuss the gist of the action for malicious prosecution and concludes with these words, which I think are important [11]: "Neither "is there any distinction between a malicious commitment and "a malicious prosecution. The present is more like the case of "an action for maliciously holding to bail than any other; in "which case it must be shown that there is an end to the suit. "The process in a civil suit is merely to bring the party into "court; and so here the warrant is to take up the party, that he "may take his trial at the assizes."

Buller J. is there saying that where there is lack of jurisdiction, the action for trespass lies, assuming that the facts amount to trespass; that there may be an action on the case, but if there is an action on the case, then, the ingredients are the same as in malicious prosecution. These would include malice.

Again, in *Taylor* v. *Nesfield* [12] Erle J. puts the matter very pithily. That was a case where the question in issue was whether the notice which had to be given under the Justices Protection Act, 1848, sufficiently showed the nature of the cause of action.[12] "The first count of the declaration was for assault and battery," that is to say, for trespass to the person. "The second count "charged that defendant, on November 3, 1853, maliciously, and "without reasonable or probable cause, issued a warrant under "his hand and seal, for the apprehending of the plaintiff, and "for bringing him before one or more of Her Majesty's justices "of the peace for the county of Derby, to answer a charge of "assault, falsely alleged to have been made by the plaintiff upon "one James Dove." The notice, which is set out in detail,[13] in effect alleged trespass to the person and did not contain the word "maliciously." Erle J.[14] puts the matter very succinctly: "I also think that this notice is bad for not showing what the "defendant is charged with, and that the act charged was "malicious. If the act of a magistrate is done without jurisdic- "tion, it is a trespass; if within the jurisdiction, the action rests "upon the corruptness of motive; and, to establish this, the act "must be shown to be malicious."

So that it appears from those two cases, and from those referred to in Bullen and Leake, that there were two possible causes of action. Against a magistrate acting outside his jurisdiction, the action was one of trespass. There was, however, another possible form of action available against a magistrate acting within his jurisdiction, and I apprehend also from *Morgan* v. *Hughes*,[15] available in appropriate cases against a magistrate acting outside his jurisdiction: that was an action in the nature of an action for malicious prosecution or malicious arrest, of which a necessary ingredient was malice.

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[11] 2 Term Rep. 225, 232.

[12] (1854) 3 El. & Bl. 724.

[13] Ibid. 725, 726.

[14] Ibid. 730.

That the normal action against a magistrate acting without jurisdiction was trespass is supported also by certain of the cases to which Mr. Baker referred me, for which I need do no more than refer to *Sommerville* v. *Mirehouse*,[16] in which Hill J., in the course of the argument, said: "If anything had been done under "the order it might be different: as soon as an invalid order is "acted upon a trespass is committed." A little earlier he refers to the other possible form of action in which malice is involved, where he quotes the rule[17] laid down in *Linford* v. *Fitzroy*[18]: "'The broad line of distinction is this; that unless the duty of "'the magistrate is simply and purely ministerial, he cannot be "'made liable to an action for a mistake in doing or omitting to "'do any thing in the execution of that duty, unless he can be "'fixed with malice.'"

So, also, in a more modern case, *Polley* v. *Fordham*,[19] it was said by Wills J.: "I am of the same opinion. It seems to me "the act complained of is the distress and nothing else. No "such thing was ever heard of as an action for making an order "against a person without jurisdiction. If the order is not "followed by consequences against the individual, it comes to "nothing. Actions for illegal distress of one sort or another were "at one time very common, but such actions were always actions "of trespass. The form of the complaint used to be that the "defendant had wrongfully entered the house or premises of the "plaintiff and had done so and so. Then any question which "arose about the warrant, the conviction, or order on which "the erroneous proceedings by way of distress and entry were "founded was raised on a defence setting up that it was justified "because of the warrant and the conviction or order on which "the warrant was founded. But the action itself was not for "erroneous exercise of jurisdiction, but was for making a distress "and breaking and entering a man's premises where there was "no right to do so. No such action as that suggested by the

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[15] 2 Term Rep. 225.

[16] (1860) 1 B. & S. 652, 657.

[17] Ibid.

[18] (1849) 13 Q.B. 240, 247.

[19] [1904] 2 K.B. 345, 348; 20 T.L.R. 435.

"respondent will be found in Bullen and Leake; in Chitty on "Pleading; or in any of the books of precedents."

I therefore reach the conclusion that the position at common law was that a magistrate acting without jurisdiction was liable in trespass for all wrongful acts done pursuant to his order. When a magistrate was acting erroneously, although within his jurisdiction, no action against him lay, unless malice was alleged and proved. The action being akin to malicious prosecution was not an action of trespass, it was in the nature of an action on the case.

It is perhaps right that I should say that doubts have been expressed by no less a person than Lord Finlay in a dictum in *Everett* v. *Griffiths*,[20] where he expresses the view that justices of the peace were not liable to be sued in respect of purely judicial acts within their jurisdiction, even if alleged to be malicious. But I think it is plain that in *Kirby* v. *Simpson*[21] the court assumed that such an action lay. If I read the headnote, I think it will suffice for the present purposes: "In "an action against a magistrate for having, in the execution of "his office, acted maliciously and without reasonable and probable cause, he is entitled to notice of action as required by the "11 & 12 Vict. c. 44, s. 9"—that is the Act in question. It is quite plain from the judgment of the court that they took the view that such an action would lie where a magistrate had acted maliciously. The same also appears from *Morgan* v. *Hughes*[22] and *Taylor* v. *Nesfield*,[23] to which I have already referred.

I hold, therefore, that at common law an action would lie against magistrates acting without jurisdiction for trespass. Therefore, it would lie in respect of false imprisonment and it would lie in respect of distress for goods. Mr. Fox-Andrews asks me to hold that it would also lie for money paid by the plaintiff pursuant to an order of the court, although no steps had been taken to enforce that order by distress or by commitment. That is to say, he says that a cause of action lies in respect of moneys which the plaintiff paid to his wife under the order of August 18, 1941, and the subsequent variations.

At common law one cannot find in the reported cases any trace of an action of this kind lying in the absence of malice. I think one must ask oneself: what is the nature of the cause of action? Plainly, it cannot be indebitatus assumpsit as money

[20] [1921] 1 A.C. 631, 666; 37 T.L.R. 481.

[21] (1854) 10 Exch. 358.

[22] 2 Term Rep. 225.

[23] 3 El. & Bl. 724.

had and received, because the money was not received by the magistrates, it was paid to their collecting officer for the use of the wife, and it was money which was paid under a pure mistake of law, namely, that the order was a valid order, a mistake of law which was shared by the magistrates and by the plaintiff. The action, therefore, must be (to use the old phraseology, and I am looking at the old common law position) an action on the case in tort.

Mr. Fox-Andrews says quite frankly that he cannot find any precedent for this, but he asks me to hold that there is a general principle under which the plaintiff is entitled to recover. He put the principle in a way which I venture to paraphrase thus: if A is clothed with an authority (and I interpolate ex hypothesi limited) and in purported exercise of that authority he does something in relation to B outside the limit of his authority, and the natural consequence of his act will be that B will act to his detriment, A is liable for any damage to B resulting from his so acting. Although I have used rather different words from Mr. Fox-Andrews, I do not think that I have put unfairly what is the proposition of law that he asks me to say is good law.

I cannot accept so broad a proposition. None of us has been able to find any precedent for it, and I see great difficulty in finding a basis for it in principle or in analogy. If A, acting in perfectly good faith, orders B to do something, which order both A and B erroneously think A is entitled to give, and B does it, I know of no principle which makes A liable for any damage suffered by B as a result of doing it. It seems to me that it is damnum absque injuria. If a policeman, who has a limited authority, orders me to cross the road in circumstances where he has no right to do so, and I do so, and as a result of that I suffer damage, both of us erroneously thinking that he is entitled to give such an order to me, I cannot see any principle on which I should be entitled to recover from the policeman the damage which I have suffered as a result of our mutual mistake of law. Now, if A does it maliciously, then it may well be that an action will lie, whether or not he has got the authority to give the order, although in *Gelen* v. *Hall*[24] the court left open the question whether an action would lie.

Gelen v. *Hall*[24] is interesting in this connexion for two reasons. That was a case of the plaintiff having been prosecuted first of all for failing to have a railway ticket, and subsequently for failing to produce it when demanded. The circumstances, very

[24] (1857) 2 H. & N. 379.

briefly, were these. He had been asked to produce his ticket. Owing to the ticket machine in 1857 being defective, the date on this ticket was wrong. Under the local Act he was taken before a magistrate and committed to the house of correction pending trial. The inspector in the meantime discovered that the machine was defective and so the ticket was all right, and the plaintiff was released from custody without ever having come to trial on that issue. He was, however, subsequently tried for failing to produce the ticket, there having been some discussion as to whether or not he would produce it at once. He brought an action, first, for false imprisonment in respect of his original commission to prison pending trial. The second count stated that the defendant, being a justice of the peace, unlawfully and maliciously and without reasonable and probable cause took the information of one P. W. against the plaintiff for having been guilty of a breach of a certain by-law of the railway company; and that the defendant wilfully, maliciously and without reasonable and probable cause did issue a summons directed to the plaintiff, and upon his appearing before the justices they wilfully, maliciously and without any reasonable or probable cause, as the defendant well knew, did convict the plaintiff and caused him to pay a sum of money to prevent him from being imprisoned; and upon appeal to quarter sessions the conviction was afterwards quashed. He claimed as special damages (which shows some analogy to Mr. Fox-Andrews' claim in the present case) the penalty which he had been compelled to pay in order to avoid the distress or commitment which would have followed had he not paid the penalty.

I do not think that it is necessary for me to deal with the first count, which was in trespass. As regards the second count, Pollock C.B., who delivered the judgment of the court, said[25]: "The second count was in respect of the conviction of the plain- "tiff on the 27th for not delivering up his ticket, and it alleges "that the defendant convicted the plaintiff wrongfully, wilfully "and maliciously, and without reasonable or probable cause, "and that the plaintiff was thereby compelled to pay a sum of "money, and that the conviction was afterwards quashed upon "appeal to the quarter sessions. As to it a verdict was found "for the plaintiff for considerable damages. A rule was obtained "on behalf of the defendant to set aside the verdict as being "against evidence, and also to arrest the judgment on the "ground that the second count discloses no legal cause of action.

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[25] 2 H. & N. 379, 398.

"Upon the latter point we have bestowed much consideration, "and we are not at present prepared to hold the count bad." Then they go on to say that, in view of the fact that they are ordering a new trial, the less they say about it the better.

That is another case where malice was alleged. *Morgan* v. *Hughes*,[26] which I have read, also suggests that malice is a necessary ingredient; and the references in the 3rd edition of Bullen and Leake also suggest that at common law no cause of action of the kind with which I am dealing, to recover money paid under an order, existed, unless malice could be proved. I therefore take the view that at common law the right of action in trespass for false imprisonment existed, but in the absence of malice no right of action existed for the money paid.

That being the position at common law it is now necessary to look at the statutes, first, to see to what extent they create fresh causes of action which did not exist at common law; and, secondly, to see to what extent they limit the common law causes of action.

I can deal quickly with the earlier statutes, of which the first is in 1751, 24 Geo. 2, c. 44. Sections 1 to 4 of that Act required notice of action to be given before an action was brought against a justice for an act done within his jurisdiction. It made provision for tender of amends. It made provision for payment into court. All these matters of minor protection related to acts done within the jurisdiction. Section 6 of the Act is not for the protection of the magistrates, but for the protection of constables who carried out warrants of arrest or commitment made by magistrates without jurisdiction, and in effect it provided that the magistrates be joined in the action and that, in the event of a warrant of a magistrate being proved to have been issued without jurisdiction, that should be a defence to the constable and judgment should be obtained against the magistrate. Section 7 does relate to malice, and provides: "That where the plaintiff in any such action against any justice "of the peace shall obtain a verdict, in case the judge before "whom the cause shall be tried, shall in open court certify on "the back of the record, that the injury for which such action "was brought, was wilfully and maliciously committed, the "plaintiff shall be entitled to have and receive double costs of "suit." Then, finally, section 8 created a limitation period of six calendar months after the act committed.

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[26] 2 Term Rep. 225.

The Act of 1803, 43 Geo. 3, c. 141, relates only to convictions and to proceedings consequent upon convictions, and upon convictions made within the jurisdiction of magistrates. It provides as follows: "That in all actions whatsoever which shall, "at any time after the passing of this Act, be brought against "any justice or justices of the peace in the United Kingdom of "Great Britain and Ireland, for or on account of any conviction "by him or them had or made, under or by virtue of any Act "or Acts of Parliament in force in the said United Kingdom, or "for or by reason of any act, matter, or thing whatsoever, done "or commanded to be done by such justice or justices, for the "levying of any penalty, apprehending any party, or for or "about the carrying of any such conviction into effect;"—that is to say, a conviction and all consequent acts upon it—"in case "such conviction shall have been quashed, the plaintiff or plaintiffs in such action or actions, besides the value and amount of "the penalty or penalties which may have been levied upon the "said plaintiff or plaintiffs, in case any levy thereof shall have "been made, shall not be entitled to recover any more or greater "damages than the sum of twopence, nor any costs of suit "whatsoever, unless it shall be expressly alleged in the declaration in the action wherein the recovery shall be had, and which "shall be in an action upon the case only, that such acts were "done maliciously and without any reasonable and probable "cause."

That section, which relates only to convictions within the jurisdiction of the magistrates and the consequences thereof, does expressly provide that the action shall, in that event, be an action on the case only, and that malice must be declared and proved. Whether before that date, for an act done within the jurisdiction, a magistrate could be made liable in trespass without malice may be doubtful; it appears to be doubtful on the cases I have cited. At any rate, from 1803 onwards in relation to convictions that position was clearly laid down by statute, whether it was declaratory of the common law or not. Then in section 2 of the same Act there is a limitation as to the damages recoverable, which is reproduced in the Act of 1848 and which, therefore, I need not pause on at the moment.

That brings me to the Act of 1848, parts of which have been repealed, but for the purpose of construing it I must, of course, look at it on the day on which it was passed. The Act of 1848 was a consolidating and amending Act. Section 1 relates to acts done by magistrates within their jurisdiction. In effect, it replaces part of section 1 of the Act of 1803, and extends it, not merely to convictions and acts consequent thereon, but to all acts done by magistrates within their jurisdiction. It provides that: "Every action hereafter to be brought against any justice of the "peace for any act done by him in the execution of his duty as "such justice, or with respect to any matter within his jurisdic-"tion as such justice shall be an action on the case as for a tort; "and in the declaration it shall be expressly alleged that such "act was done maliciously, and without reasonable and probable "cause; and if at the trial of any such action, upon the general "issue being pleaded, the plaintiff shall fail to prove such "allegation, he shall be non-suit, or a verdict shall be given for "the defendant." It is therefore plain that whether or not this was declaratory of the common law as in respect of judicial acts after 1848, an action against a magistrate for an act done within his jurisdiction, although it would in other circumstances have amounted to trespass, could not be sued for in trespass, but could be sued in case only, and malice was a necessary ingredient of the action.

Then in section 2, for the first time except for that limited part of the Act of 1751 which dealt with protection of constables when magistrates had acted outside their jurisdiction, there is a provision, and a very important provision, for the protection of magistrates acting outside their jurisdiction. It provides as follows: "For any act done by a justice of the peace in a "matter of which by law he has not jurisdiction, or in "which he shall have exceeded his jurisdiction, any person "injured thereby, or by any act done under any convic-"tion or order made or warrant issued by such justice in any "such matter, may maintain an action against such justice in "the same form and in the same case as he might have done "before the passing of this Act, without making any allegation "in his declaration that the act complained of was done "maliciously, and without reasonable and probable cause: . . ." Those words are important, "in the same form and in the same "case as he might have done before the passing of this Act." Pausing there, I think it is plain that this part of the section was not intended to alter the common law rights or the nature of the common law cause of action. I draw attention to the fact that in contradistinction to section 1, which says that in future the cause of action where a magistrate is acting within his jurisdiction shall be on the case, whatever it may have been in the past, section 2 says that it shall, where he is acting outside his jurisdiction, be "in the same form and in the same case as "he might have done before the passing of this Act."

Then there is this proviso: "Provided nevertheless, that no "such action shall be brought for anything done under such "conviction or order until after such conviction shall have been "quashed, either upon appeal, or upon application to Her "Majesty's Court of Queen's Bench; nor shall any such action "be brought for anything done under any such warrant which "shall have been issued by such justice to procure the appearance of such party, and which shall have been followed by a "conviction or order in the same matter, until after such conviction or order shall have been so quashed as aforesaid; or if "such last-mentioned warrant shall not have been followed by "any such conviction or order, or if it be a warrant upon an "information for an alleged indictable offence, nevertheless if a "summons were issued previously to such warrant, and such "summons were served upon such person, either personally, "or by leaving the same for him with some person at his "last or most usual place of abode, and he did not appear "according to the exigency of such summons, in such case no "such action shall be maintained against such justice for any-"thing done under such warrant."

That proviso, at which I shall have to look again when I come to the question of limitations, makes it a fresh requirement which did not exist prior to the passing of the Act, that the action must not be brought until the conviction shall have been quashed. That, I think, in effect assimilates the law as to a conviction when made without jurisdiction, to the law which existed previously as to a conviction good upon its face. A conviction good upon its face was a good answer to trespass until the conviction had been set aside. This proviso says that you cannot, even where the conviction is without jurisdiction, bring the action until it is set aside.

Section 3 provides: "Where a conviction or order shall be "made by one or more justice or justices of the peace, and a "warrant of distress or of commitment shall be granted thereon "by some other justice of the peace bona fide and without "collusion, no action shall be brought against the justice who "so granted such warrant by reason of any defect in such conviction or order, or for any want of jurisdiction in the justice "or justices who made the same, but the action (if any) shall "be brought against the justice or justices who made such conviction or order." That is a section which applies both where the justices are acting within and where they are acting without their jurisdiction. It alters the law, I think, in that it takes away a cause of action, which would otherwise have existed, against magistrates who granted the commitment on an invalid warrant, and it grants—and it may be that in some circumstances this is creating a fresh cause of action—a right of action against the justices who made the order. I think there may well have been circumstances in which such a right of action would not have existed prior to this section being passed.

Mr. Fox-Andrews relied on section 6: "In all cases where "a warrant of distress or warrant of commitment shall be "granted by a justice of the peace upon any conviction or order "which, either before or after the granting of such warrant, shall "have been or shall be confirmed upon appeal, no action shall "be brought against such justice who so granted such warrant "for anything which may have been done under the same by "reason of any defect in such conviction or order." That was, I think, a fresh protection, and in effect it meant that if justices had, rightly or wrongly, been upheld on appeal they were protected against any action. Section 7 merely provides that actions which were by this Act prohibited may be set aside.

Section 8 is the original limitation section, and it is in broadly the same terms as the Public Authorities Protection Act, 1893. It is a six-months' period after the act complained of shall have been committed. That is very similar to the words in the Public Authorities Protection Act, 1893.

Section 9, which corresponds to the first section of the Act of 1751, in so far as there is a requirement of notice, provides: "No such action shall be commenced against any such justice of "the peace until one calendar month at least after a notice in "writing of such intended action shall have been delivered to him, "or left for him at his usual place of abode, by the party intending "to commence such action, or by his attorney or agent, in which "said notice the cause of action, and the court in which the "same is intended to be brought, shall be clearly and explicitly "stated; . . ." and then on the back the attorney's name shall be put.

Both those sections have been repealed, but, as I have said, in construing the Act one has to look at it when it was passed. I merely note in passing—I shall come back to it—that there is here a condition precedent to the bringing of the action, which is the giving of a notice. The draftsman of the Act appears to regard the cause of action as existing, before that condition precedent to the bringing of the action has been satisfied.

I do not think that I need refer to sections 10 to 12, but section 13 is another section on which Mr. Fox-Andrews relies. It is the child of section 2 of the Act of 1803, which it replaces, and it provides as follows: "In all cases where the plaintiff in any such "action shall be entitled to recover,"—so that it deals with cases where the plaintiff is entitled to recover, it does not on the face of it appear to create any fresh cause of action—"and he shall prove "the levying or payment of any penalty or sum of money under "any conviction or order as parcel of the damages he seeks to "recover, or if he prove that he was imprisoned under such conviction or order, and shall seek to recover damages for any such "imprisonment, he shall not be entitled to recover the amount of "such penalty or sum so levied or paid, or any sum beyond the "sum of twopence as damages for such imprisonment, or any "costs of suit whatsoever, if it shall be proved that he was "actually guilty of the offence of which he was so convicted, "or that he was liable by law to pay the sum he was so ordered "to pay, and (with respect to such imprisonment) that he had "undergone no greater punishment than that assigned by law "for the offence of which he was so convicted, or for non-payment of the sum he was so ordered to pay."

That, on the face of it, does not appear to be a section which is creating fresh causes of action, but is limiting the amount of damages recoverable in certain circumstances. The section covers actions in respect of acts of magistrates both within and outside their jurisdiction, and I think that in construing it one has to look to see whether there were circumstances before the Act was passed in which a penalty levied or sum of money ordered to be paid was recoverable in an action against a magistrate. It seems to me that there were cases in which a penalty levied, or a sum of money ordered to be paid, was recoverable. One example I have already read in Bullen and Leake, where a sum of money was paid in order to obtain release from imprisonment. That would apply in the present case to the sum of £5 which was paid by the plaintiff in order to be released from imprisonment in the first instance. It would also cover such a case as in *Norton* v. *Monckton*,[27] which was, indeed, a similar case, in which a sum was paid in order to get release from prison. It would cover, too, a case where, in order to obtain release of a distress issued for money due, a payment had been made, and it might also cover such cases as *Gelen* v. *Hall*,[28] where a penalty has been paid under a malicious conviction.

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[27] (1895) 43 W.R. 350.

It seems to me that all the words of the section are fully satisfied by the existing possibilities under the common law of claiming "payment of any penalty or sum of money under any "conviction or order as parcel of the damages," and I cannot read that section as creating any new cause of action in respect of a penalty or sum of money ordered to be paid that did not exist at common law. I think Mr. Fox-Andrews argued that rather faintly towards the end, but at any rate I cannot so construe the section.

I think, therefore, that in order to determine what the rights of the plaintiff are, one must look to see what his common law rights were. I hold that, at common law, he had a right of action for false imprisonment and for any special damages which would flow from that, such as loss of wages, or money paid to get out of prison, but that he had no right of action in respect of any of the sums paid to his wife. It will follow from this that the action lies, in my view, only against those defendants who made the order and the variation order for non-obedience to which imprisonment took place. The last imprisonment finished in 1945, and the imprisonment was only for disobedience to the order as varied up to April, 1942. It would follow that he had cause of action only against the defendants Nos. 1 to 4, of whom the defendants Nos. 1 to 3 made the original order, and the defendants Nos. 3 and 4 made the first variation order. As however, the defendant No. 4 is dead, and as the plaintiff is no longer proceeding against him, it would follow for the purposes of this case that the only cause of action disclosed, in my view, is against the defendants Nos. 1 to 3.

Since I have so held, that no action lies, I do not know that it is necessary for me to deal with two other grounds upon which Mr. Baker argued, that even if the first three defendants were liable, those who made the variation orders were not. However, in deference to his argument, it is probably convenient that I should express my view, and I can express it very briefly.

The first ground on which he so argued was, that the original order made on August 18, 1941, was valid until set aside, and that the subsequent magistrates were entitled to act upon it and treat it as valid. In support of that proposition he cited *Reg.* v. *Swindon Justices*[29] and *Rex* v. *Lancashire Justices, Ex parte*

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[28] 2 H. & N. 379.

[29] (1878) 42 J.P. 407.

Tyrer.[30] Those cases do not assist me, because they were cases of convictions which were valid upon their face. This order, as I have already held, is invalid upon its face, and where a magistrate is confronted with an order which is invalid upon its face, he cannot rely upon the protection. The cases to which I originally referred seem to me to support this view, and also the passage from Park J.'s judgment in *Brittain* v. *Kinnaird*[31] in which he cites a passage from Lord Ellenborough's judgment in *Gray* v. *Cookson*[32] to which Mr. Fox-Andrews referred me.

I should deal in this connexion also with the point that, under the practice of the Surrey Petty Sessions, magistrates who deal with the variation of an order do not have the original order put before them. So that it is perfectly fair to say of those magistrates who dealt with the variation orders that they never saw the order which was invalid on its face. If they had, I do not suppose it would have made any difference, but still it is to be said that they did not have it before them. I do not think that that helps them, because if one looks at the variation orders, each of them provides, after the variation, that "save "and subject to such variation the said order shall remain in "force." If magistrates, although acting sensibly and in a businesslike way (because they rely, and have to rely, upon their skilled clerks and officers in these matters), agree to vary an order without looking at it, I do not think they can say that they were not affected by notice that the order was invalid on its face. It seems to me to be a matter of common sense, anyway, but I think some support is to be found in *Polley* v. *Fordham* (*No.* 2).[33] That was again a case where there was a perfectly sensible and businesslike practice. A metropolitan magistrate had not in fact noticed that there was a defect in the summons, so that he was without jurisdiction; certainly none of the Divisional Court in that case thought that that was any protection to him. So I do not find that that is a good defence in the case of the defendants Nos. 4 to 14.

The second ground on which Mr. Baker asked me to say that they were excused is on the construction of section 3 of the Act of 1848 which provides that: "Where a conviction or order "shall be made by one or more justice or justices of the peace, "and a warrant of distress or of commitment shall be granted "thereon by some other justice of the peace bona fide," then no action could be brought against the second justice of the peace. On the strength of the bicycle cases—*Corkery* v. *Carpenter*,[34] *Taylor* v. *Goodwin*[35] and *Cannan* v. *Earl of Abingdon*,[36] Mr. Baker asks me to read the words, "and a "warrant of distress or of commitment shall be granted thereon "by some other justice of the peace," as if they included, "and the said order shall be varied or a warrant of distress or of "commitment shall be granted by some other justice of the "peace." I do not think that I can on the strength of any bicycle cases strain the language of the section so far.

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[30] [1925] 1 K.B. 200; 41 T.L.R. 103.

[31] (1819) 1 Brod. & Bing. 432, 440.

[32] (1812) 16 East 13, 28.

[33] (1904) 91 L.T. 525.

So that my finding about the cause of action is based upon the view which I take of the position at common law and under the Act.

I must turn now to the next point, which is concerned with section 21 of the Limitation Act, 1939, upon which Mr. Baker relies. I have already held that there was a cause of action in respect of the false imprisonment which finished in 1945. Such act of which he complained was plainly done more than one year before the action was brought. The relevant statute, having regard to the dates, is section 21 of the Limitation Act, 1939. Mr. Fox-Andrews says this: "No doubt the last act which the "defendants did was more than a year before the writ was "issued," and I think he would go further, and say: "No doubt "if the relevant limitation were that of the old Public Authorities "Protection Act, 1893, where the time ran from the 'act, "'neglect or default complained of,' I would be out of court." But he says that the date from which time runs in the Act of 1939 is the date when the cause of action accrued. He refers to section 2 of the Act of 1848, and says: "By reason of the proviso "which requires the conviction to be quashed, the cause of action "did not accrue until October 6, 1954, when the original order of "the magistrates and the subsequent orders were set aside by "the Divisional Court. Since the writ was plainly issued within "a year of that date, despite the fact that all this took place "over 10 years ago, I am not defeated by the Limitation Act."

That means I have to construe the proviso to section 2 of the Act of 1848 and construe it, of course, in its context. I draw attention again to the fact that the substantive part of the section to which the proviso is appended is not purporting to alter any existing cause of action. It is indeed saying: "may maintain an action against such justice in the "same form and in the same case as he might have done before "the passing of this Act"; in contradistinction to section 1, which is stating that thereafter every action shall be an action on the case. Then section 2 goes on: "Provided nevertheless, "that no such action shall be brought for any thing done under "such conviction or order, until after such conviction shall have "been quashed, either upon appeal, or upon application to Her "Majesty's Court of Queen's Bench; . . ." Now here there was not and could not be any conviction. The word is, in any event, inappropriate to matrimonial proceedings of this kind, and in this particular case the only thing which could be called by any stretching of the use of the word a "conviction" would be the conviction for having been guilty of persistent cruelty to the wife, and there was on the face of the order (and that, indeed, is the whole cause of the trouble) a finding that such guilt had not been proved.

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[34] [1951] 1 K.B. 102; 66 T.L.R. (Pt. 2) 333; [1950] 2 All E.R. 745.

[35] (1879) 4 Q.B.D. 228.

[36] [1900] 2 Q.B. 66; 16 T.L.R. 318.

Mr. Fox-Andrews asks me to read that part of the section as if, instead of the word "conviction," which appears there, there were the words, "conviction or order," as indeed there are in the latter part of the section, which deals with liability for a warrant which shall be followed by a conviction or order. So that Mr. Fox-Andrews is, in effect, asking me to put in words which are not there, although in a somewhat similar context the draftsman has put in the words "or order."

I have to construe this part of the section as part of a section which is taking away common law rights. The substantive part of it, which I have just read, is asserting or saving common law rights, and this is a proviso which is cutting them down. It is saying: "Although at common law you could have brought an "action in particular circumstances, nevertheless your common "law rights will be cut down, unless certain other circumstances "exist." It is a limitation section, preventing a subject from exercising rights which he otherwise would exercise. I think that, in those circumstances, I must approach it without broadening the construction so as to exclude rights which are not excluded by the plain terms of the section. I remember, too, the history of the Act, where special provisions in the Act of 1803 were included in relation to convictions and nothing else. I do not read this Act as extending the expression "conviction" to "conviction "or order," and so I hold that the plaintiff's case is not brought within the proviso at all because there was no conviction.

It is, I agree, a little ironical that in construing the Act, as I think I must, so as not to take away the rights of the subject to a greater extent than the plain terms of the Act so require, the result in this particular case is that the plaintiff has not got a reply, which he would or might otherwise have, to the claim that an action of this kind is time barred.

But I think that there is another reason why this reply to the plea of the Limitation Act is not good. I have already pointed out that the section does not purport to alter the nature of the cause of action; it leaves the cause of action untouched. What was the cause of action here? The cause of action, and the only cause of action, as I have held, was trespass, unlike actions under section 1, which are actions on the case. What does "cause of "action accrued" mean? Let me take the analogy I put to Mr. Fox-Andrews, that is, the analogy of malicious prosecution where it is clear law that the action cannot be brought unless the conviction has been set aside; it cannot be brought while the conviction still subsists. Nevertheless, although that is a fact which would have to be proved in order to succeed, time runs in malicious prosecution from the date at which the loss, which is followed by special damage, arose. So, also, there are cases of conditions precedent to bringing actions, such as that (familiar in a great many other statutes as well) which was contained in section 9 of the Act of 1848, where it is provided: "That no "such action shall be commenced against any such justice of the "peace until one calendar month at least after a notice in writing "of such intended action shall have been delivered to him, or "left for him at his usual place of abode . . . in which said "notice the cause of action . . . shall be clearly and explicitly "stated." It is plain that the draftsman of the Act regarded the cause of action as having accrued, but the requirement of notice was a procedural requirement before the action could be brought.

My attention has been drawn to cases which Mr. Baker said, and I think Mr. Fox-Andrews accepted, seem to run on parallel lines without meeting. I think the real distinction, between the one line of cases and the other is, whether the particular requirement constitutes part of the cause of action or whether it is in the nature of a requirement which bars the remedy, though the cause of action already exists. The cases to which I was particularly referred, on the one hand by Mr. Fox-Andrews and on the other by Mr. Baker, were, to begin with, the well-known case of *Board of Trade* v. *Cayzer, Irvine & Co. Ltd.*,[37] which was a case on the *Scott* v. *Avery*[38] arbitration clause, and a case in which, incidentally, the strongest case in Mr. Baker's favour, *Coburn* v. *Colledge*,[39] was cited to their Lordships. It does not seem to me that the *Cayzer, Irvine* case[40] presents any very close analogy to the type of question which I have to consider here. It was, as I read it, no more than a decision that the parties to a contract which contains the *Scott* v. *Avery*[41] arbitration clause, are entitled to contract, and do contract, that a cause of action, either for breach of the contract or under the contract, shall not arise until certain conditions are fulfilled. It does not seem to me that that sort of consideration really affords me much guidance in this particular case.

A case much nearer the mark, on which Mr. Fox-Andrews relied, was *Musurus Bey* v. *Gadban*.[42] In that case it was held that while the Turkish Ambassador was entitled to diplomatic immunity time did not run. I will not cite the judgments in that case; I will merely say that I find considerable difficulty in understanding exactly what the ratio decidendi of the *Musurus Bey* case[42] was. It seems to have been based, at any rate in part, on the view of the extraterritoriality of the Ambassador, or alternatively on the non-existence of a person who could be sued.

The third case on which Mr. Fox-Andrews relied was *Read* v. *Brown*.[43] That is the case about the jurisdiction of the Mayor's Court and whether the cause of action arose within the jurisdiction. It was there held that an assignment of the debt to the plaintiff was a necessary part of the cause of action, and as the assignment took place within the jurisdiction, therefore the Mayor's Court had jurisdiction. That case does not seem to me to help Mr. Fox-Andrews, unless he is prepared to say that time as respects that debt only ran from the date of the assignment.

Mr. Baker relied strongly on *Coburn* v. *Colledge*,[44] a decision of the Court of Appeal within three years after the decision in *Musurus Bey*,[45] which does not appear to have been cited. That was an action by a solicitor for the amount of his bill of costs, and the question that arose there was whether the cause of action arose when the work was completed, or whether it arose after he had sent a written notice, which was a condition precedent to his recovering his fees. The relevant provision of the Solicitors Act, 1843, was: "No attorney or solicitor . . . shall commence "or maintain any action or suit for the recovery of any fees, "charges, or disbursements for any business done by such "attorney or solicitor, until the expiration of one month after "such attorney or solicitor, . . ." shall have sent a notice. It was held there that, despite the requirement of notice before any action could be brought, time ran, nevertheless, from the date at which the work was done. In that case it was the Statute of James, the old Limitation Act, 1623, where the same words, "cause of action" applied.

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[37] [1927] A.C. 610; 43 T.L.R. 625.
[38] (1856) 5 H.L.C. 811.
[39] [1897] 1 Q.B. 702; 13 T.L.R. 321.
[40] [1927] A.C. 610.
[41] 5 H.L.C. 811.
[42] [1894] 2 Q.B. 352; 10 T.L.R. 493.
[43] (1888) 22 Q.B.D. 128; 5 T.L.R. 97.
[44] [1897] 1 Q.B. 702.
[45] [1894] 2 Q.B. 352.

The other case on which Mr. Baker relied was *Monckton* v. *Payne*,[46] where it was decided that time began to run for a cause of action in respect of a fine when entry was made, and not upon the date when the landlord, who was entitled to dictate the amount of the fine, did so. I must say I find myself some difficulty in seeing how time could run for an amount which was unfixed, even although it lay within the sole power of the landlord to fix the sum, which, incidentally, I do not think it did, because it had to be a reasonable sum, and presumably somebody else would determine what was reasonable. I do not really think that that case throws much light upon this problem.

After great hesitation I have come to the conclusion that this requirement falls within the *Coburn* v. *Colledge* [47] category rather than the category of a fact forming part of the cause of action. I think that it is a requirement which prevents the remedy, but does not form part of the cause of action. I think that the cause of action here lies in trespass; that, to apply the test in *Coburn* v. *Colledge*,[47] it is unnecessary to state in the declaration that the conviction has been set aside, although it appears in the precedents in Bullen and Leake, and I say that because of the contrast between section 1 of the Act of 1848, which expressly requires malice to be stated in the declaration, and the very next section, where it puts in a proviso that the conviction must be set aside, but does not put in such a requirement for it being in the declaration.

I am therefore of the opinion that the quashing of the conviction as in the case of malicious prosecution or in the case of the old notice under section 9 of the Act when it was originally passed, does not form an essential part of the cause of action,

[46] [1899] 2 Q.B. 603; 15 T.L.R. 531.

[47] [1897] 1 Q.B. 702.

but is a requirement which has to be satisfied before the remedy for the already existing cause of action can be pursued. It therefore follows that I hold that the defence of the Limitation Act applies.

This is obviously a case of great difficulty, and it is probably desirable, in case it goes elsewhere, that I should express my view as to the damages for false imprisonment in the event of my proving wrong as to the point on the Limitation Act. The plaintiff underwent imprisonment for a total period of 193 days: a short period in 1942, when he bought himself out at the end of about 10 or 11 days, and two long periods, each of three months, one in 1944 and one in 1945. I assess the general damages for the total period at £650, to which there has to be added special damage for the agreed sum of £200, being loss of wages during that period, and I think he is entitled to the additional £5, although I do not know that that is strictly pleaded as special damage for false imprisonment. So that if I were wrong as to liability, I should assess the total damages at £855.

As regards the other part of the claim, I do not think that I should be assisting anyone if I sought to assess damages for that. Finding, as I do, great difficulty in seeing what the cause of action is against any of the magistrates, and, if there is a cause of action, what the cause of action is against each group of magistrates, I do not think I really could assist in trying to say what is the measure of damages for a cause of action which I do not understand, and how it is to be applied against different magistrates. In those circumstances, I do not propose to make any finding as to the measure of damages.

Judgment for the defendants.

C. J. E.

The plaintiff appealed.

N. R. Fox-Andrews Q.C. and *R. L. Bayne-Powell* for the plaintiff.

G. G. Baker Q.C. and *David Wacher* for the defendants.

The arguments sufficiently appear from the arguments in the court below, but the following cases, in addition to those cited by their Lordships, were referred to: *United Australia Ltd.* v.

Barclays Bank Ltd.[1]; *Violett* v. *Sympson*[2]; *Rex* v. *Willesden Justices, Ex parte Utley*[3]; *Rex* v. *Lancashire Justices, Ex parte Tyrer*[4]; *Wood* v. *Wood.*[5]

In the course of the argument SINGLETON L.J. said that his attention had been called by MORRIS L.J. to the Law Reform (Limitation of Actions) Act, 1954, by which section 21 of the Limitation Act, 1939, had been repealed and the limitation period extended. Assuming that the court held that it was necessary to get the order quashed before there was a cause of action, what would be the effect?

Counsel said that so far the case had been considered by both parties on the assumption that only the applicability of the Act of 1939 was in question. They would consider the question raised by their Lordships during the luncheon adjournment.

On the court resuming the following agreed statement was read by *Baker Q.C.*: If, when the Act of 1954 came into operation, there was any cause of action which was barred under the Act of 1939, that cause of action remained barred. If there was a cause of action which was not barred, then the period was extended to complete a period of six years from the time of its arising, or it remained unbarred and the Act of 1954 in the present case had no consequence. If the cause of action arose in October, 1954, the Act of 1939 would have no application. Any question of statute-barring would arise under the Act of 1954 if it could.

If the quashing in October, 1954, is the time when any cause of action arises, that cause of action is in no way affected by any statute of limitations.

If any cause of action arose on the making of the January, 1954, order or variation, that cause of action is not affected by any statute of limitations and remains unbarred.

If any cause or causes of action arose on payment of sums of money, any payments made within the 12 months before June, 1954, i.e., payments made after June 4, 1953, remain unbarred.

Any cause of action which arose, accrued, or came into being before June 4, 1954, was barred by the Act of 1939.

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[1] [1941] A.C. 1; 57 T.L.R. 13; [1940] 4 All E.R. 20.

[2] (1857) 8 El. & Bl. 344.

[3] [1948] 1 K.B. 397; 64 T.L.R. 21; [1947] 2 All E.R. 838.

[4] [1925] 1 K.B. 200; 41 T.L.R. 103.

[5] (1874) L.R. 9 Exch. 190.

SINGLETON L.J. This is an appeal by the plaintiff from a judgment of Diplock J. given on January 24, 1956. The claim of the plaintiff was against 14 justices of the peace for the Petty Sessional Division of Kingston-upon-Thames for damages for false imprisonment and for acts done by the defendants without jurisdiction while sitting as justices of the peace.

[His Lordship stated the facts and continued:] The plaintiff went to gaol on three occasions, and he claimed damages for false imprisonment in respect of the periods which he spent in gaol. The last of those periods was from July 20, 1945, to October 19, 1945. He paid the collecting officer, for his wife and child, the sums set out in the statement of claim, and he claims those sums from the justices (or from some of them) as damages suffered by him. He had no legal advice in the early stages, though he consulted welfare officers. In 1954 he consulted a solicitor, and on April 5, 1954, he applied by counsel to the Kingston magistrates for a discharge of the order of August 18, 1941. They held that they had no jurisdiction to grant his application.

On October 5, 1954, he applied to a Divisional Court of the Probate, Divorce and Admiralty Division, and on October 6 that court granted him leave to appeal out of time and set aside the order and the variation orders.

The order of the Divisional Court reads: "Upon reading the "notice of appeal dated April 9, 1954, filed on behalf of the "appellant, the husband, by way of appeal from the orders of "the justices of the Petty Sessional Division of Kingston-on-"Thames . . . dated August 18, 1941, April 27, 1942, July 9, "1951, August 13, 1951, January 4, 1954, and April 5, 1954, "and upon hearing counsel on behalf of the parties, the appel-"lant by leave withdrawing the appeal against the order dated "April 5, 1954, and having extended the time in which to appeal "against all other orders, the husband undertaking not to reopen "matter as to any payments made thereunder. It is ordered on "October 6, 1954, that the appeal be and the same is hereby "allowed the said orders . . . discharged." I shall refer later to the undertaking which was given and which was embraced in the order. It is to be observed that the justices, who are respondents in the appeal now before us, were not parties to the proceeding before the Divisional Court. We were informed that the position of the justices was not mentioned on the hearing before Lord Merriman P. and Willmer J. as counsel had not then in mind the question of bringing an action against them.

The order of the justices of August 18, 1941, was produced before the Divisional Court. It is clearly bad on the face of it. There was also produced a document headed "Reasons for "judgment" which reads: "Persistent cruelty. The reasons "for judgment in this case are that both the complainant and "the defendant have consented to the order." That is signed by Mr. Isaacs. The document is one drawn up, no doubt, because of a practice rule in the Divisional Court of the Probate, Divorce and Admiralty Division.

It is clear that an order could not be made on the ground of persistent cruelty if the complaint of persistent cruelty was not found to be proved, as appears from the order of the justices. Precisely what took place on the hearing on August 18, 1941, cannot be proved after these years. No doubt the justices were satisfied that the plaintiff consented to something, but Diplock J. did not consider that he consented to an order involving the consequences which it did. No one has questioned the fact that the order, being bad on the face of it, could not stand if the plaintiff was given leave to appeal out of time. In the course of his judgment the President said: "I now come to what, in my "opinion, is the only real issue in this case, and that is, how to "get rid of the order of August 18, 1941, for it must be got rid "of somehow. The husband manifestly is at mercy after this "long lapse of time in asking us to give leave to appeal against "that order, worded as it is, and very properly, in my opinion, "Mr. Bayne-Powell has told us that he had already anticipated "that particular difficulty and had obtained instructions to give "an undertaking on the part of the husband, as one of the terms "for granting leave to appeal out of time, that the book should "remain closed as regards any payments made under such order "down to date, and that there would be no question, if the "original order was set aside, of any attempt to obtain repay"ment of any payment that had been made. That seems to me "to be a most proper suggestion, and one that relieves us from "imposing it as a term, because it is quite clear, whatever else "is not clear in this case, that there never has been any practical "doubt that the husband was paying to the collecting officer of "the court under some form of compulsion, albeit he may have "consented to the compulsion in some shape or another in the "first instance. So at the end of it all I think that the proper "way to deal with this case is to give leave to appeal now against "the original order, on the basis that the husband undertakes "not to reopen any payments made under that order or the "various orders by which the original order has purported to be "varied, and, having given leave to appeal, to discharge the "order. On that, the whole bag of orders, so to speak, falls. "All the variations fall with the original order, and it is open "to either party to start de novo, but not retrospectively."

Willmer J. said: "Our power to grant that leave is, of course, "discretionary, and, taking the view that it ought to be exer"cised in this case, I, like my Lord, am impressed for one thing "by the fact that an undertaking has been given on behalf of "the husband not to seek to recover hereafter any of the pay"ments which have been made under the original order, an "undertaking which relieves us from imposing any terms."

On the hearing before Diplock J., Mr. Isaacs, who was chairman of the justices on August 18, 1941, gave evidence. I refer to some questions and answers which are recorded in the transcript of the evidence. Mr. Fox-Andrews asked Mr. Isaacs: (Q.) "Was this case dismissed?" (A.) "It is 17 years ago, and "from my recollection I am under the impression there must "have been a mistake in that register, because I do not think we "should have dismissed the case and then gone on to say: "'How much a week are you going to pay to your wife?' "(Q.) What is it we are trying to decide in this case? Are you "now saying in fact you found the complaint proved? (A.) I "am saying all those years ago I cannot remember it. I am "putting before his Lordship and the court that I cannot under"stand how it was that we went on and asked this man and "negotiated and made an order for payment if we had dismissed "this case. It is my own personal impression that we found "the case was proved, and that there must have been some "mistake in the entering of the book. That is my own recollec"tion about it, and I can only be honest and say that is my "recollection."

Diplock J. interposed during the cross-examination and said: "Mr. Isaacs has said very fairly and quite understandably: 'I "'simply cannot remember what happened.' I should have "been surprised if he had said anything else." Mr. Fox-Andrews said: "That, of course, I follow, but are you trying to "excuse this muddle in some way?" Mr. Isaacs answered: "Trying to excuse it? No, I am not trying to excuse any "muddle. I am trying to give you the facts as I know them, "as I can remember them."

No one can challenge the good faith of Mr. Isaacs. The difficulty in which he and his fellow-magistrates were placed was that the case came up so many years after the order was made, and no one could have a clear recollection of what had happened. The matter before the justices was under the Summary Jurisdiction (Married Women) Act, 1895; and whether other questions than that embraced in the summons—other questions under section 4 of the Act—were mentioned or not, no one has any idea after this lapse of time.

It is pleaded in the statement of claim: "On October 6, 1954, "the Divisional Court of the Probate, Divorce and Admiralty "Division on the hearing of an appeal out of time by the plaintiff "against the purported maintenance order and variation orders "aforesaid (but not against the adjudication that the plaintiff "was not guilty of persistent cruelty) set aside the said purported order and variation orders and adjudged them to have "been made without jurisdiction." It was said upon the hearing before us that the imprisonment of the plaintiff was unlawful in that the original order of the justices was made in excess of jurisdiction, and that he had paid sums which he ought not to have been ordered to pay and, consequently, the defendants (or some of them) were responsible in damages.

The defendants had pleaded section 21 of the Limitation Act, 1939, as a bar to the action. Section 21 provides: "No "action shall be brought against any person for any act done in "pursuance, or execution, or intended execution of any Act of "Parliament, or of any public duty or authority, or in respect "of any neglect or default in the execution of any such Act, duty "or authority, unless it is commenced before the expiration of "one year from the date on which the cause of action accrued."

I draw attention to the words "from the date on which the "cause of action accrued." Each of the terms of imprisonment of which complaint was made had ended many years before action brought. To overcome this difficulty, counsel for the plaintiff sought to show that the cause of action did not arise until the order of the justices had been quashed. This point arises upon section 2 of the Justices Protection Act, 1848, which provides: "For any act done by a justice of the "peace in a matter of which by law he has not jurisdic"tion, or in which he shall have exceeded his jurisdiction, any "person injured thereby, or by any act done under any conviction "or order made or warrant issued by such justice in any such "matter, may maintain an action against such justice in the "same form and in the same case as he might have done before "the passing of this Act, without making any allegation in his

" declaration that the act complained of was done maliciously, " and without reasonable and probable cause: Provided, nevertheless, that no such action shall be brought for any thing done " under such conviction or order until after such conviction shall " have been quashed, either upon appeal, or upon application to " Her Majesty's Court of Queen's Bench; nor shall any such " action be brought for any thing done under any such warrant " which shall have been issued by such justice to procure the " appearance of such party, and which shall have been followed " by a conviction or order in the same matter, until after such " conviction or order shall have been so quashed as aforesaid."

The first three lines of the section appear to deal with an act done by a justice himself. The next part of the section preserves a right of action for any act done under an order made by a justice in a matter in which he exceeded his jurisdiction and any person injured thereby may maintain an action against such justice in the same form and in the same case as he might have done before the passing of the Act and without alleging malice, subject to the proviso.

Mr. Fox-Andrews' submission involves two points: first, that there should be read into section 2 the words " or order " after the word " conviction " in the twelfth line; and secondly, in a case such as this it was essential for the plaintiff to prove that the order of the justices had been quashed before he could bring an action against the justices. Thus, he claimed that the cause of action for false imprisonment was not barred as the order was not quashed until October 6, 1954. I propose to deal with the second point first.

In an ordinary case of false imprisonment one would assume that the cause of action was the imprisonment. The submission on behalf of the plaintiff is that the quashing of the order was a necessary ingredient of the cause of action.

In *Douglas* v. *Forrest*[1] Best C.J. said: " Cause of action is " the right to prosecute an action with effect; no one has a " complete cause of action until there is someone that he can " sue."

The case most helpful to the plaintiff is *Read* v. *Brown*.[2] That was a case in contract, and it will be seen that the plaintiff could have no cause of action until the debt in respect of which the action was brought had been assigned to him. " The plaintiff " brought an action in the Mayor's Court as assignee of a debt

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[1] (1828) 4 Bing. 686, 704.

[2] (1888) 22 Q.B.D. 128; 5 T.L.R. 97.

"alleged to be due in respect of the price of goods sold and "delivered to the defendant by the assignor. The sale and "delivery had taken place without the city of London, but the "debt had been assigned in writing to the plaintiff pursuant to "section 25 (6) of the Judicature Act, 1873, within the city of "London." It was held "that the assignment of the debt was "part of the cause of action, and that the cause of action having "arisen in part within the city of London there was no ground "for a prohibition."

It appears obvious that the plaintiff could have no right of action until the debt had been assigned to him. Lord Esher M.R. said[3]: "The question which we have to decide is whether any "part of the cause of action arose in the City; if it did, then upon "the proper construction of the Mayor's Court Act, the Mayor's "Court had jurisdiction to try the case. What is the real meaning of the phrase 'a cause of action arising in the city?' It "has been defined in *Cooke* v. *Gill*[4] to be this: every fact which "it would be necessary for the plaintiff to prove, if traversed, in "order to support his right to the judgment of the court. It "does not comprise every piece of evidence which is necessary "to prove each fact, but every fact which is necessary to be "proved. It has been suggested today in argument that this "definition is too broad, but I cannot assent to this, and I think "that the definition is right. If that is so, the question arises "whether the plaintiff, in order to be entitled to succeed in his "action, would not be bound to prove the assignment to him of "the debt; not merely whether he would be bound to prove it in "an action in the Mayor's Court, but whether he would be bound "to prove it in any court in which he might sue, and whether an "allegation of the assignment might not have been traversed by "the defendant. I cannot bring myself to entertain a doubt that "the assignment is a fact which the defendant might traverse; "and if that be so, the plaintiff would be bound to prove it."

Fry L.J. said[5]: "I am of the same opinion. Everything "which, if not proved, gives the defendant an immediate right "to judgment, must be part of the cause of action. If the plaintiff in the present case were to fail at the trial to prove the "assignment he could not succeed, therefore part of his cause "of action did arise in the City." Lopes L.J. said[6]: "I agree "with the definition given by the Master of the Rolls of a cause "of action, and that it includes every fact which it would be

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[3] 22 Q.B.D. 128, 131.
[4] (1873) L.R. 8 C.P. 107.
[5] 22 Q.B.D. 128, 132.
[6] Ibid. 133.

"necessary to prove, if traversed, in order to enable a plaintiff "to sustain his action."

As I have pointed out, the appeal in that case—indeed, the whole case—depended upon the plaintiff proving the assignment of the debt on which he sued. The words of the Master of the Rolls were approved in a later case to which I need not refer: I do not read them as covering the question before this court.

Reliance was also placed on a passage in Lord Dunedin's speech in *Board of Trade* v. *Cayzer, Irvine & Co. Ltd.*[7] The passage on which Mr. Fox-Andrews relied reads: "The Solicitor-"General contended that 'cause of action' in this sentence was "not the same thing as cause of action in the statute of James, "but really only meant right of action, which he would differen-"tiate from cause of action. Here, again, I think his contention "fails. The expression is, I think, deliberately chosen, and it "may not be out of place to remark that the same expression is "used by two of the consulted judges whose opinion was upheld "—namely, Crowder and Coleridge JJ. Cause of action in the "statute of James means that which makes action possible; and "in the present case that is the award of the arbitrator, for until "it is in being no action is possible."

It is, however, impossible to take this one passage without reference to the facts of the case and to other parts of Lord Dunedin's speech. In *Board of Trade* v. *Cayzer, Irvine & Co. Ltd.*[7] these were the facts: "In May, 1917, the Crown requisi-"tioned the claimants' steamship under the conditions of the "T.99 form of charterparty. By those conditions the Crown "undertook liability for war risks only. Clause 31 provided that "any dispute under the charter should be referred to arbitration "under the provisions of the Arbitration Act, 1889, and it con-"cluded as follows: 'and it is further mutually agreed that such "'arbitration shall be a condition precedent to the commence-"'ment of any action at law.' In July, 1917, the steamship was "lost, as the claimants alleged, by war risks, but the claimants "did not proceed to arbitration until December, 1923. The "Crown contended that, as the arbitration was not commenced "within six years of the loss, the claim was barred by the Limita-"tion Act, 1623. The arbitrator, by an award made in the form "of a special case, found that the steamship was lost by war "risks (as to which there was no appeal), and that the claim "was not barred by the Limitation Act, 1623." It was held "that under the form of arbitration clause in question no cause

[7] [1927] A.C. 610, 617; 43 T.L.R. 625.

" of action arose until the award was made, and that consequently " time did not run under the Limitation Act, 1623, until the " making of the award, and the claim was not barred."

Lord Cave L.C. is recorded as having said [8]: " My Lords, " it appears to me that the decision given in *Scott* v. *Avery* [9] " disposes of the present appeal. Under the statute of James, " which applies to this case, time runs from the cause of action; " and it seems to me to follow beyond question that under the " clause which we are considering, and having regard to the case " cited, time runs not from the date of the loss of the steamship " but only from the making of the award. If this be so, then " the arbitrator, however willing he may have been to give effect " to all legal defences, could not properly have found that time " had run against the claimants. It is argued that on this view " of the law claimants under a document containing an arbitration " clause in the *Scott* v. *Avery* [9] form might delay their proceed" ings indefinitely, and a claim might be made ten or twenty " years after the damage had arisen. This may be so, but, if so, " it is a feature which results from the form of contract which " the parties have chosen to adopt; and it may be noted that it is " at any time open to either party to expedite a decision of the " matter by himself instituting proceedings for arbitration."

Lord Dunedin said [10]: " It has, I think, to be kept steadily " in view that the liability which is here in question is not a " liability in respect of tort. If a ship were sunk by a collision " occasioned by the fault of another ship there is an immediate " liability which springs into existence when the collision occurs. " But here there was not any liability arising from the collision " as against the Government, except the liability that sprang " from contract. One goes, therefore, to the contract, and then " one finds that there is not undertaken by the Government any " liability unless there has been found to be such a liability by " the award of an arbitrator. It cannot be more forcibly put " than it was by Cranworth L.C. in *Scott* v. *Avery* [11]: ' If I " ' covenant with A.B. that if I do or omit to do a certain act, " ' then I will pay to him such a sum as J.S. shall award as the " ' amount of damage sustained by him, then until J.S. has made " ' his award, and I have omitted to pay the sum awarded, my " ' covenant has not been broken, and no right of action has " ' arisen '; or again by Lord Herschell in *Caledonian Insurance*

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[8] [1927] A.C. 610, 615.

[9] (1856) 5 H.L.C. 811.

[10] [1927] A.C. 616.

[11] 5 H.L.C. 848, 854.

"*Co.* v. *Gilmour* [12]: 'Under the policy, the only contract on the "'part of the appellants to make any payment at all is a contract "'to pay the sum ascertained in a particular manner, viz., "'by the arbitration provided for by . . . the policy.' The "Solicitor-General made a strenuous effort to distinguish the "clause in *Scott* v. *Avery* [13] from the present clause. In that "I think he was quite unsuccessful. The two clauses are practically the same. The arbitrator in each is to be the judge, "both of the existence of the liability and of the sum to be paid "if he finds liability established; and it is that sum and that "sum alone that the Government has contracted to pay. The "question here raised is what is the application to these facts of "the expression 'cause of action' in the statute of James? Now "Lord Campbell, in *Scott* v. *Avery*,[13] said—and it is the sentence "of his judgment which Lord Watson quotes in *Caledonian* "*Insurance Co.* v. *Gilmour*,[14] stating that it is the main ground "of judgment—that 'in this contract it is stipulated, in the most "'express terms, that until the arbitrators have determined, no "'action shall lie in any court whatever. That is not ousting "'the courts of their jurisdiction, because they have no jurisdiction whatever, and no cause of action accrues until the "'arbitrators have determined.'" Then follows the passage relied upon by Mr. Fox-Andrews which I have read. I do not regard the decision in *Board of Trade* v. *Cayzer, Irvine & Co. Ltd.*[15] as supporting the argument for the plaintiff on this part of the case.

On behalf of the defendants we were referred to the case of *Haylock* v. *Sparke*,[16] which was a case under the Justices Protection Act, 1848: "The notice . . . of action against a justice "of the peace for an act done by him in execution of his office, "under an order, in a matter of which he has not jurisdiction, "may be given before the quashing of the order; the act itself "being the cause of action, and such cause of action being "complete before the quashing, although the action itself, by "section 2, cannot be brought until after the quashing."

Various points were taken in that case in the court of first instance; and Pollock C.B. held the fourth objection fatal, and directed a verdict to be entered for defendant. The fourth point was that under section 9 of the Act of 1848 the notice of action was insufficient, not having been given after the cause of action was completed. In the course of the argument Coleridge J. asked counsel: "Do you say that no cause of action existed here "until the warrant was quashed?" The reply was: "The cause "of action was at any rate suspended; there was no cause of "action within the statute, so as to allow of notice being given." Lord Campbell said[17]: "The quashing of the warrant can "scarcely be called 'the act complained of'"; to which counsel said: "It is one of the elements which makes the entire trans-"action an act capable of being complained of."

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[12] [1893] A.C. 85, 90; 9 T.L.R. 146.

[13] 5 H.L.C. 848, 854.

[14] [1893] A.C. 85, 97.

[15] [1927] A.C. 610.

[16] (1853) 1 E. & B. 471.

In the course of delivering the judgment of the court Lord Campbell C.J. said[18]: "In this case we are of opinion that the "notice of action was sufficient,"—that is, notice under section 9—"although given before the warrant of commitment was "quashed. Supposing this warrant to be in the nature of a "conviction, so that the action could not have been maintained "unless the warrant had been quashed, we think that the notice "of action was regularly given on the 18th of May. The quashing "of the warrant was no part of the cause of action; and, before "the warrant was quashed, all the requisites of the notice of "action enumerated in section 9 of Statute 11 & 12 Victoria, "chapter 44, might be and were complied with. If, in the case "of a conviction, the magistrate receives such a notice before "the conviction is quashed, he may at his peril rely upon the "validity of the conviction, and abstain from tendering amends: "but, if he does so, and the conviction is quashed, the action "may be commenced against him one calendar month after the "service of the notice. Were not this so, the party injured "might be barred of his remedy altogether; for, by section 8 of "the same statute, the action must be commenced 'within six "'calendar months next after the act complained of shall have "'been committed.' In argument it was contended that the "six months might be construed to run from the quashing of the "conviction; but the commitment is the act complained of, not "the quashing of the conviction on the application of the party "imprisoned. The quashing of the conviction is only a condition "to the prosecution of the action like the delivery of an attorney's "bill, or the giving a notice of action: and there is nothing to "determine in what order the conditions shall be complied with."

If the judgment of the court, given by Lord Campbell, was right, it seems to me that the plaintiff's submission on this head must fail. It is not without interest to notice that Lord Campbell

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[17] 1 E. & B. 471, 475.

[18] Ibid. 484.

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was a party to the decision in *Scott* v. *Avery*,[19] to which reference was made in the speeches in the House of Lords in *Board of Trade* v. *Cayzer, Irvine & Co. Ltd.*[20] The difference between a case in contract and one in tort appears clearly from both reports.

In *West Riding of Yorkshire Rivers Board* v. *Robinson Brothers* [21] *Haylock's* case [21a] was cited and accepted by the Court of Appeal. I refer in particular to a passage in the judgment of Sir Gorell Barnes P. and to a passage in Farwell L.J.'s judgment in which he said: "To my mind the principle of the case of "*Haylock* v. *Sparke* is really an authority in favour of the view "which we are expressing"; and also to a passage in the judgment of Buckley L.J.

Sommerville v. *Mirehouse* [22] is interesting as showing the view of Hill J. in the year 1860. That, again, was an action against justices, and the question arose under section 11 of the Act of 1848. In that case the order had been quashed. The court consisted of Sir Alexander Cockburn C.J. and Hill J.; and in the course of the argument questions of interest were raised by counsel. The Chief Justice said: "They" (the justices) "made "a judicial mistake in deciding that a sufficient complaint was "made within the time limited by section 11 of" the statute. Hill J. later said: "If anything had been done under the order "it might be different: as soon as an invalid order is acted upon "a trespass is committed"; to which counsel replied: "The "point as to jurisdiction is the same whether the order is acted "upon or not." Hill J. said: "There is no *injuria* until a "seizure of the plaintiff's goods is made in execution of the "order." The Chief Justice said: "There was a good cause of "complaint before the justices, but a statute of limitations pre-"vented it from being proceeded upon." Counsel then said: "If justices decide wrongly as to their jurisdiction they are liable "to an action for an act which they do in consequence."

Coburn v. *Colledge*,[23] which was also cited to us, is a case upon an attorney's bill of costs, in which it was held that "In "the case of a solicitor's costs the cause of action arises when "the work is completed, and therefore the Statute of Limitations "begins to run from that time, and not from the expiration of a "month from the delivery of the bill of costs." Lord Esher M.R.

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[19] 5 H.L.C. 810.

[20] [1927] A.C. 610.

[21] [1907] 1 K.B. 431, 438, 441, 444; 23 T.L.R. 249.

[21a] 1 E. & B. 471.

[22] (1860) 1 B. & S. 652, 657.

[23] [1897] 1 Q.B. 702; 13 T.L.R. 321.

said [24]: "It is admitted that, if the cause of action in this case "must be considered to have arisen when the work was completed, "the defendant must succeed; but, if it must be considered as "having arisen only at the expiration of the period of one month "from the delivery of the signed bill of costs, the plaintiff must "succeed. It does not appear to me that there is any question "as to the construction of the Statutes of Limitation. It is "plain that under them the action must be brought within six "years after the cause of action arises, unless the defendant is "beyond the seas when the cause of action arises, in which case "it must be brought within six years of his return. The question "is when in such a case as this the cause of action arises. The "action is brought by the plaintiff in respect of work done by "him as a solicitor. In the case of a person who is not a solicitor, "and who does work for another person at his request on the "terms that he is to be paid for it, unless there is some special "term of the agreement to the contrary, his right to payment "arises as soon as the work is done; and thereupon he can at "once bring his action.

"Before any enactment existed with regard to actions by "solicitors for their costs, a solicitor stood in the same position as "any other person who has done work for another at his request, "and could sue as soon as the work which he was retained to do "was finished, without having delivered any signed bill of costs "or waiting for any time after the delivery of such a bill. Then "to what extent does the statute alter the right of the solicitor "in such a case, and does the alteration made by it affect or alter "the cause of action? It takes away, no doubt, the right of the "solicitor to bring an action directly the work is done, but it does "not take away his right to payment for it, which is the cause "of action. The Statute of Limitations itself does not affect the "right to payment, but only affects the procedure for enforcing it "in the event of dispute or refusal to pay.

"Similarly, I think section 37 of the Solicitors Act, 1843, "deals, not with the right of the solicitor, but with the procedure "to enforce that right. It does not provide that no solicitor shall "have any cause of action in respect of his costs or any right "to be paid till the expiration of a month from his delivering a "signed bill of costs, but merely that he shall not commence or "maintain any action for the recovery of fees, charges, or disbursements until then. It assumes that he has a right to be "paid the fees, charges, and disbursements, but provides that

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[24] [1897] 1 Q.B. 705, 707.

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"he shall not bring an action to enforce that right until certain "preliminary requirements have been satisfied. If the solicitor "has any other mode of enforcing his right than by action, the "section does not seem to interfere with it. For instance, if he "has money of the client in his hands not entrusted to him for "any specific purpose, there is nothing in the section to prevent "his retaining the amount due to him out of that money. If "that be the true construction of the section, it does not touch "the cause of action, but only the remedy for enforcing it.

"The definition of 'cause of action' which I gave in *Read* "v. *Brown* [25] has been cited. I there said that it is 'every fact "'which it would be necessary for the plaintiff to prove, if "'traversed, in order to support his right to the judgment of the "'court'"; and later: "For these reasons I think that the "cause of action in this case, to use the language of the Statute "of Anne, was 'given, accrued, fallen or come' the moment "that the work which the plaintiff was retained to do was com-"pleted." Lopes and Chitty L.JJ. agreed.

The plaintiff is faced with further difficulties in other sections of the Act of 1848, some of which are now repealed. I refer in particular to section 9 and section 12, in each of which the words "cause of action" appear, and from which one gains added support for the opinion of Lord Campbell in *Haylock* v. *Sparke*.[26] Diplock J. said in his judgment: "It is plain that the draftsman "of the Act regarded the cause of action as having accrued, but "the requirement of notice was a procedural requirement before "the action could be brought."

I am satisfied that the cause of action for false imprisonment arose not later than the time of the imprisonment in each case. This makes it unnecessary to consider the first point raised, though in deference to the argument I must say something upon it. There is much to be said for the argument that one cannot make sense of the proviso unless one reads the words "or order" after the word "conviction" in the twelfth line of the section. Support is given to the argument by the inclusion of the words in the Act covering Ireland passed in the following year. The words may have been omitted by inadvertence. On the other hand, it appears to me to be more likely that the draftsman was endeavouring to preserve the position that a conviction ought to be set aside in the proper place before it can be questioned in a civil court, while an order is in a different category.

[25] 22 Q.B.D. 128.

[26] 1 E. & B. 471.

After this court adjourned on Friday (April 20), Morris L.J. drew my attention to the report of an application to the Divisional Court in *Reg.* v. *Isle of Ely Justices, Ex parte Gilling.*[27] It is right to say that there was no argument, but it is interesting to see the view then taken. No good reason is shown for reading any words into the section, and the court ought not to do so. In my opinion, the claims for damages for false imprisonment are statute-barred and must fail, as Diplock J. held.

The claim for damages in respect of money paid to the collecting officer is made in the statement of claim, and reads: "By "reason of the said purported order for maintenance and the "said purported orders of variation the plaintiff paid to his said "wife and for his said child the sums hereinunder set out." The sums are set out, and the statement of claim ends: "And the "plaintiff claims damages." On the basis that the quashing of the order does not form an essential ingredient of the cause of action, the cause of action, if any, arose at the time each payment was made.

The defendants plead section 21 of the Limitation Act, 1939, as a bar to the action, wholly or in part. Regard must now be had to the Law Reform (Limitation of Actions) Act, 1954. It is agreed between counsel that the effect of those two Acts is that the plaintiff cannot go further back than one year before the passing of the later Act, which was June 4, 1954, and that on that footing the amount of payments not barred by statute is £125 5s. 6d. Furthermore, figures have been agreed as to the extent in amount to which each of eight of the justices named upon the record is claimed to be responsible. The plaintiff concedes that on this hypothesis the defendants Reynolds, Thomas and Haldane are entitled to judgment.

The claim of the plaintiff is put in this way:—In all cases where a man has a temporal loss or damage by the wrong of another he may have an action upon the case repaired in damages (Comyns' Digest, vol. 1, p. 278). The Act of 1848 did not take away that right: indeed, it preserved it, by enacting in section 2 that, if a justice of the peace exceeded his jurisdiction and a person was injured "by any act done under any conviction or "order made or warrant issued by such justice in any such "matter," that person "may maintain an action against such "justice in the same form and in the same case as he might have "done before the passing of this Act." It appears to me that in sections 1 and 2 an effort is made to cover the kinds of action which a person might have before the passing of the Act, and those are preserved. The justices are given protection by the proviso to section 2 and by certain other sections, such as sections 6, 7, 9, 11, 12 and 3 (in regard to those who only grant a warrant of distress or commitment).

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[27] (1855) 4 W.R. 13.

The first question for consideration is whether there was, prior to the year 1848, a cause of action against justices of the peace to recover payments such as were made by the plaintiff in the present case, i.e., payments made to his wife under an order of the justices, which order was bad upon the face of it and which was made in excess of jurisdiction. There is, we are informed by counsel on both sides, no record in the books of any such case. In *Polley* v. *Fordham*[28] Wills J. said: "No such thing was "ever heard of as an action for making an order against a "person without jurisdiction. If the order is not followed by "consequences against the individual, it comes to nothing. "Actions for illegal distress of one sort or another were at one "time very common, but such actions were always actions of "trespass." There are, as I shall show, cases of trespass to goods or trespass to the person in which a sum paid afterwards to secure release has been held to be recoverable as part of the damages, but no case of the kind now put forward has been discovered.

In support of his argument that such a cause of action was recognized under the common law, Mr. Fox-Andrews cited *Hodson* v. *Cooke*,[29] and the report reads: "In an action upon "the case for commencing of an action against him in an Inferior "Court, where the cause of action did arise out of the jurisdiction. "After a verdict for the plaintiff, upon not guilty, it was moved "in arrest of judgment, that it was not set forth that the defendant did know, that the place where the action arose was out "of the jurisdiction, which it would be hard to put the plaintiff "to take notice of. On the other side it was said, that the party "ought to have a recompense for the inconvenience he is put to, "by being put to bail perhaps in a case where bail is not required "above, and such like disadvantages which are not in a suit "brought here; and the plaintiff ought at his peril to take notice "of the place. And of that opinion were Lord Chief Justice "Jeffreys, Holloway J. and Walcot J.; but Withens J. contra." The case is not very fully reported. I do not think that much, if any, help is gained from it.

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[28] [1904] 2 K.B. 345, 348; 20 T.L.R. 435.
[29] (1683) 1 Ventris 369.

The next case which was cited was *Beaurain* v. *Scott*[30]: "An "action on the case may be maintained against a judge of the "ecclesiastical court who excommunicates a party for refusing "to obey an order which the court has not authority to make, or "where the party has not been previously served with a citation "or monition, nor had due notice of the order. The practice "of the ecclesiastical court is matter of fact to be proved by "evidence, and left to the jury. This was an action on the "case, for unlawfully excommunicating the plaintiff. The declaration stated that, at the time of committing the grievance "complained of, the defendant" (who was Sir William Scott) "was Vicar General and Official Principal of the Consistorial and "Episcopal Court of Beilby, by divine permission then Lord "Bishop of London; that the plaintiff was a person of good fame, "and a practising attorney; that a cause of separation from bed "and board and mutual cohabitation was then depending in the "said Court, in which a minor son of the plaintiff was cited to "appear before the defendant, to answer Anne Beaurain his "lawful wife in the said cause, but to which the plaintiff was "no party; yet that the defendant required the plaintiff to take "upon himself the burthen of guardian to his said infant son, "and appear in such suit as guardian ad litem; which burthen "the plaintiff wholly refused to take upon himself, as he lawfully "might; that the defendant afterwards signed with his name and "published a certain instrument, purporting to be a schedule of "excommunication; by which said instrument the said defendant, "as Vicar General of the said Bishop of London, and Official "Principal of his Consistorial and Episcopal Court, pretending "to be armed with legal authority, and pretending that justice "so required, unjustly and unlawfully decreed the said plaintiff "to be excommunicated for certain alleged contempts and contumacy in not appearing at a certain day and place as the "guardian assigned to his said infant son; whereas the plaintiff "was not legally appointed the guardian ad litem for his said "son; that the said schedule of excommunication was signed and "published without the plaintiff's having been served with any "citation, monition, decree, or legal notice whatsoever to take "upon himself the burthen of the said guardianship; that such "excommunication was afterwards read during divine service in "the parish church of St. Botolph, Bishopsgate, the same being "the parish where the plaintiff resided; and he was then and

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[30] (1813) 3 Camp. 388.

"there openly and publicly declared and denounced excommunicated by the minister of the said parish; by means whereof the "plaintiff had suffered in his good name, been injured in his "profession, sued by his creditors, and reduced with his family "to great distress, poverty, and ruin.—Plea, the general issue.

"It appeared that Sir William Scott, as Vicar General and "Official Principal of the Consistorial Court of the Bishop of "London, had required the plaintiff to appear as guardian ad "litem to his son; and ordered him to be excommunicated for "refusing to do so. On appeal to Sir John Nicholl, as Dean of "the Arches, that learned judge held that Mr. Beaurain was "compelled to become guardian ad litem to his son, and that "the excommunication was regular. The matter being referred "back to the Consistorial Court, the schedule of excommunication "issued, and was published in the parish church of St. Botolph, "Bishopsgate.

"The plaintiff's counsel contended, that the action was maintainable on two grounds: 1st, Because the Ecclesiastical Court "had no authority to compel Mr. Beaurain to become guardian "to his son against his will, but ought either to have appointed "one of its own officers guardian, as is done in the courts of "equity, or allowed a guardian to be appointed by the plaintiff "in the suit, as is done in the courts of common law; and, 2dly, "Because no regular citation or monition had been served upon "Mr. Beaurain before the excommunication was directed. It "was allowed that he had previously made an affidavit in the "suit respecting the appointment of a guardian, and that he had "verbal notice of the order to appear as guardian; but it was "insisted that, till a regular citation or monition was served upon "him, he was not properly before the court, and the judge could "have no authority to proceed to excommunication.

"On the other side, they did not deny that the action might "be maintained, if the Ecclesiastical Court had exceeded its "jurisdiction; but they called witnesses to prove that the plaintiff "was bound to become guardian for his son, and that the proceedings against him were perfectly regular.—Among these was "Sir John Nicholl,"—who had heard the case earlier—"who "stated, that he continued of the same opinion as when he dismissed the appeal.—It was proved that the plaintiff might have "done all that was required of him with hardly any trouble, and "no expense; and that, in point of fact, he was acquainted with "the order to become guardian ad litem as soon as it was pronounced. It further appeared, that after the excommunication

"Sir William Scott had behaved with great generosity to the "plaintiff, amidst the misfortunes which then overtook him; and "that he had expressed the most unbounded gratitude for the "kindness he experienced.

"Lord Ellenborough left it to the jury to decide upon the "effect of the evidence, stating, that he himself did not perceive "any thing unreasonable in the plaintiff being required to become "guardian ad litem in the manner described; and that the plaintiff seemed to have had sufficient notice of the appointment "according to the practice of the Ecclesiastical Court.

"The jury found a verdict for the plaintiff, with forty shillings "damages; observing, at the same time, that they did not mean "to throw the slighest reflection upon the highly respectable "character of Sir William Scott.

"No motion was made for a new trial, or in arrest of judgment." There is an interesting footnote.

I thought it right to read the report of that case, in which the verdict of the jury was given on March 16, 1813. It is interesting for more reasons than one, one of which, I notice, is that the defendant in the case, Sir William Scott, did not raise or cause to be raised the point of law which is taken in this case. It may be that he preferred to have a decision upon the facts and instructed counsel (the Solicitor-General), appearing on his behalf, not to take the point.

It is to be noticed that in that case (and in another case of the like nature) everyone assumed that damage or injury was caused on the issue of the decree of excommunication. That appears from the next case cited, *Ackerley* v. *Parkinson*[31]: "An "action upon the case was held not to lie against the vicar-"general of the bishop for excommunicating plaintiff with the "greater excommunication, for contumacy in not taking upon "him administration of an intestate's effects, to whom plaintiff "was next of kin, and had intermeddled with the goods, &c. "although the citation by which plaintiff was cited was void, by "reason that it required him to appear and take administration, "&c. without leaving him an option to renounce it, and the "proceedings thereupon had been set aside upon appeal; for the "vicar-general had jurisdiction over the subject-matter, viz., "the granting administration, and there was no malice."

In the course of the argument for the plaintiff appear these words[32]: "'. . . and the reason is, that by the excommunication "'the party is disabled to sue any action or to have any remedy

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[31] (1815) 3 M. & S. 411.

[32] Ibid. 415.

" 'for any wrong done to him, so long as he remains excommunicate. And also the party grieved may have his action on the " 'case against the bishop, in like manner as he may when the " 'bishop doth excommunicate him for a matter which belongeth " 'not to ecclesiastical cognizance.' " *Beaurain* v. *Scott*[33] was cited and Le Blanc J., dealing with the facts of that case, said[34]: "The whole fallacy of the argument lies in considering every step "taken in the cause as an excess of jurisdiction, because some "steps have been erroneously taken; whereas the distinction is, "that where the subject-matter is within the jurisdiction, and "the conclusion is erroneous, although the party shall, by reason "of the error, be entitled to set it aside, and to be restored to "his former rights, yet he shall not be entitled afterwards by "action to claim a compensation in damages for the injury done "by such erroneous conclusion, as if, because of the error, the "court had proceeded without any jurisdiction." It appears that the learned judge was of opinion that in a case of that character the plaintiff, if he succeeded in establishing his case, would be entitled to recover damages. That may well be because of the fact that damage flowed immediately upon the issue of the order of excommunication.

The next case to which reference was made by counsel was *Clark* v. *Woods, Smith and Cooper*[35]: "At the trial, before "Pollock C.B. at the London sittings after Michaelmas term, "1847, it appeared that the plaintiff, who was a householder, "residing at South Bersted in the county of Sussex, being unable "to pay his poor rates and costs in respect of the same, and "there being no sufficient distress upon his premises, a warrant "for his apprehension was granted by two of the defendants, "being magistrates for that county." The form of the warrant is set out. "After reciting the making of the rate, the assessment of Richard Clark, the plaintiff, in the sum of £17 19s. 6d. "thereto, and his refusal to pay the same, and that . . . two "justices, &c., had issued their warrant to levy the said sum of "£17 19s. 6d., and the further sum of 6s. for costs incurred in "the premises, making in the whole the sum of £18 5s. 6d. by "distress and sale of the goods and chattels of the plaintiff, &c., "it proceeded as follows . . . Upon these facts, it was contended "at the trial, on behalf of the plaintiff, that the warrant was "bad, inasmuch as no power is given by the 43 Elizabeth, "chapter 2, section 4, to arrest for the non-payment of costs;

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[33] 3 Camp. 387.

[34] 3 M. & S. 411, 427.

[35] (1848) 17 L.J.M.C. 189.

"and that the defendants were therefore liable to repay, by way "of damages, to the plaintiff the sum of £18 5s. 6d., which he "had paid under protest."

The plaintiff in that case had been arrested for non-payment of the amount, and the amount included 6s. costs, which led the plaintiff to claim that the warrant was bad. Pollock C.B. said[36]: "With respect to the amount of damages, I wish the law would "allow us to give the defendants the benefit of the amount which "was rightfully due from the plaintiff; but we cannot escape "from the position that if a debtor be wrongfully arrested and "under the duress of such imprisonment compelled to pay a debt "justly due from him, such amount may be recovered back by "action. Here the warrant was bad altogether; the plaintiff, "therefore, was entitled to recover all the money which he was "compelled to pay by reason of the arrest and imprisonment "under it."

Rolfe B. said[37]: "The imprisonment of which the plaintiff "complains was the act of the three defendants, and they are "one and all responsible for it, unless they can show that they "were justified in making the arrest"; and, a little later: "With "respect to the amount of damages, I should be very glad if "we had the power to reduce them; but it appears to me that "in point of law the plaintiff was entitled to recover back as "damages the full amount he was compelled to pay in order to "escape further imprisonment under a warrant which turns out "to be altogether bad."

Platt B. said[38]: "The law is clear that if by an unlawful act "a party extracts from another a sum of money, whether legally "due or not, he must pay back the full amount so extracted. "Upon the other points in the case I entirely concur with the "observations which have fallen from the other members of the "court."

That, it should be made clear, was a case of trespass to the person. The amount which was awarded as damages was the amount which the plaintiff had to pay in order to put an end to his arrest, which had been held to be wrongful. For all I know, the damages might have been larger.

The next case is *Norton* v. *Monckton*[39] (which was not cited to Diplock J.). In that case: "The plaintiff was arrested under "a committal warrant signed and issued by the defendant, a

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[36] 17 L.J.M.C. 189, 193.

[37] Ibid. 193.

[38] Ibid. 194.

[39] (1895) 43 W.R. 350; 11 T.L.R. 242.

"justice of the peace, for non-payment of a debt made up of a "certain sum of money alleged to be due from the plaintiff to "the local sanitary authority, under an order made at quarter "sessions." Counsel for the plaintiff claimed that his client was "entitled to recover the whole of the sum of £49 6s. 10d. "by way of special damage. He was compelled to pay that sum "in order to obtain his release." He pointed out that the Act of Elizabeth did not extend to costs and that the warrant, as was admitted, was altogether bad. Wills J. said[40]: "In this case "the committal warrant was issued without jurisdiction, and "therefore the plaintiff is entitled to recover the money he had "to pay to obtain his release from prison. We are bound by "the decision in *Clark* v. *Woods*,[41] cited for the plaintiff's case, "and we direct that the arbitrator must award the plaintiff the "sum of £49 6s. 10d., as claimed, by way of special damage." That case again was a case of trespass to the person.

In *Polley* v. *Fordham*[42]: "A magistrate, having convicted "and fined the plaintiff for an offence under the Vaccination "Acts, issued a distress warrant in default of payment of "the fine, and a distress was put in on the plaintiff's premises "accordingly. Subsequently the conviction of the plaintiff was "quashed for want of jurisdiction. In an action by the plaintiff "against the magistrate for illegal distress," it was held "that "the period limited by section 1 of the Public Authorities "Protection Act, 1893, began to run from the entry on the plaintiff's premises, and not from the date of the conviction." There are certain words of Wills J. in that case to which I referred on the earlier part of the case, and I need not read them again.

One other case to which we were referred was *Abbott* v. *Sullivan*,[43] a case in the Court of Appeal, which came before Evershed M.R. and Denning and Morris L.JJ., in which damages were claimed against certain members or certain officials of a trade union. That case was considered by the Court of Appeal on the basis of a contract between the parties. I do not think that it helps towards a decision upon the case now before the court. Mr. Fox-Andrews relied upon certain passages in the judgment of Denning L.J., but in so far as they can be applied to the present case they were not relevant (as I see it) to the decision of the Court of Appeal in that case.

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[40] 43 W.R. 351.

[41] 17 L.J.M.C. 189.

[42] [1904] 2 K.B. 345; 20 T.L.R. 435.

[43] [1952] 1 K.B. 189, 200; [1952] 1 T.L.R. 133; [1952] 1 All E.R. 226.

Mr. Fox-Andrews submitted that the money was paid by the plaintiff to the agent of the justices, the defendants. This should be made clear: the collecting officer is not the agent of the justices when he receives payment under an order such as this. That appears if regard is had to section 5 (*c*) of the Summary Jurisdiction (Married Women) Act, 1895; to section 1 (3) of the Affiliation Orders Act, 1914 (the procedure under which covers collection of sums under the Summary Jurisdiction (Married Women) Act); and also by reference to section 4 of the Married Women (Maintenance Orders) Act, 1949. Counsel added: "The "plaintiff did not owe the money to his wife. He was ordered "to pay. He paid because he had been sent to prison for non-"payment and was afraid of being sent to prison again. There "is the element of compulsion."

Mr. Baker, on behalf of the defendants, pointed out that there is no record of an action of this kind in the books, and that on the facts shown there was no cause of action under the common law. Furthermore, he said that there was no need for the plaintiff to pay under a bad order and that the money was paid to the collecting officer under a mistake of law.

Diplock J. expressed his view upon this part of the case in these terms[44]: "I hold, therefore, that at common law an "action would lie against magistrates acting without jurisdic-"tion for trespass. Therefore, it would lie in respect of false "imprisonment and it would lie in respect of distress for goods. "Mr. Fox-Andrews asks me to hold that it would also lie for "money paid by the plaintiff pursuant to an order of the court, "although no steps had been taken to enforce that order by "distress or by commitment. That is to say, he says that a "cause of action lies in respect of moneys which the plaintiff "paid to his wife under the order of August 18, 1941, and the "subsequent variations. At common law one cannot find in "the reported cases any trace of an action of this kind lying "in the absence of malice. I think one must ask oneself: what "is the nature of the cause of action? Plainly, it cannot be "indebitatus assumpsit as money had and received, because the "money was not received by the magistrates, it was paid to their "collecting officer for the use of the wife, and it was money "which was paid under a pure mistake of law, namely, that the "order was a valid order, a mistake of law which was shared by

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[44] Ante, p. 312.

"the magistrates and by the plaintiff. The action, therefore, "must be (to use the old phraseology, and I am looking at "the old common law position) an action on the case in tort." The judge, having cited the authorities, added: "I therefore "take the view that at common law the right of action in "trespass for false imprisonment existed, but in the absence of "malice no right of action existed for the money paid."

I agree with the judge. There is, however, a further point upon the reading of the section, part of which I take to be declaratory of the common law. It gives, or preserves, a right of action against a justice for any act done under any order made by such justice in any such matter if the person suing is injured thereby. The words "act done" contemplate an act done by someone other than the plaintiff—e.g., trespass. They are not intended to cover the case of a person himself paying money, which is the subject-matter of the claim on this part of the case. The injury suffered by the plaintiff in respect of which he seeks damages is the payment of money by him. That was not an "act" within the meaning of the word in the fourth line of section 2. This claim, too, fails.

There are two other matters to which I should draw attention. Diplock J. said in his judgment: "It is conceded that upon that "finding that persistent cruelty had not been proved the magis"trates had no jurisdiction to make an order under the Summary "Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, "it being a condition precedent to their right to make an order "that the husband shall have been guilty of one of the matri"monial offences which are set out in section 4 of the Summary "Jurisdiction (Married Women) Act, 1895, one of which is "persistent cruelty, and that being the one that was relied upon. "The order in itself shows that there was no jurisdiction. It is "an order that is bad on its face, and where an order is bad "upon the face of it, it ceases to have the advantage which "orders although made without jurisdiction but good on their "face have, namely, that they are valid and are to be treated "as valid until they have been set aside."[45]

Mr. Baker told us that he had conducted the case on the basis that it was not open to him to say that the act of the justices was not without jurisdiction. That may well be so, on the facts of this case, but it should not be taken that every order which is bad on its face is an order made without jurisdiction. The difficulty here arose in part because so many years had elapsed before the validity of the order was called in question and no one could say precisely what had happened at the time of the making of the order. On the face of it, it appeared to have been made without jurisdiction, and no explanation was given. By section 3 of the Act the action (if any) lies only against the justices who made the original order, and not against a justice who issued a warrant of commitment thereon. If there had been a practice of referring to the original order on application for a commitment order, it is probable that the error would have been observed very many years ago, for, as I have said, the order was bad on the face of it. Unfortunately, this was not the practice. The question of protection for justices of the peace acting in good faith is worthy of consideration by the legislature.

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[45] Ante, p. 292.

The other matter arises upon the undertaking given to the Divisional Court. In the order it is in these words: "the "husband undertaking not to reopen matter as to any payments "thereunder." It was not pleaded, or suggested, that this was a bar to the action against the justices for damages in respect of the money payments. The question was not mentioned in the Divisional Court. If it had been, it may well be that the court would not have exercised its discretion to give leave to appeal so many years out of time, for the order was bad and no court could well pay attention to it once it was examined—or, as an alternative, an undertaking in wider terms might have been required before leave to appeal out of time was granted, so that the justices would have been protected. After all, there was no allegation of malice or bad faith on the part of the justices. They cannot be expected to check in each case the order which is drawn up. They must rely to a large extent upon their clerk. This action, brought against 14 justices, of whom 11 did no more than make variations of the original order, must have been a source of worry to them. I recognize the importance of the claim for damages for false imprisonment, but at the same time I regret that it was thought necessary to include a claim in respect of the money payments, in view of the undertaking which was given before the Divisional Court. The appeal should be dismissed.

Morris L.J. The hearing of this appeal, and likewise the hearing before the judge, proceeded on the basis that it was not being challenged that the order made by the magistrates on August 18, 1941, was made without jurisdiction. The same applies to the later variations of the order and also to the committal orders which were made. We have not, therefore, been concerned in this case with any controversy as to jurisdiction and we have heard no argument on that subject. It follows from the undisputed facts that the plaintiff was wrongly detained on each of the three occasions when he was sent to prison. The last of these occasions terminated in October, 1945. It has been common ground that as against some of the justices there had arisen causes of action in the plaintiff for damages for false imprisonment. The plaintiff issued his writ on December 21, 1954. He was met by a plea based upon section 21 of the Limitation Act, 1939.

So far as concerns the claims of the plaintiff which relate to the sums of money paid by him pursuant to the orders made, the position is affected by the Law Reform (Limitation of Actions) Act, 1954, and it appears to be common ground between the parties that if there are causes of action they are barred if and to the extent that they accrued before June, 1953. The total claim referable to the period since that date is just over £125.

It has been agreed that the justices concerned with the claims for damages for false imprisonment are within the protection afforded by the words of section 21 of the Limitation Act, 1939, if the plaintiff's action was commenced after the expiration of one year from the date on which the causes of action accrued. Two main points have therefore been raised in the appeal: (1) when there accrued to the plaintiff causes of action based upon trespass or false imprisonment—it being conceded that as against some of the justices there did arise at some time such causes of action; and (2) whether there was ever in the plaintiff a cause of action against some of the justices based upon the fact that the plaintiff paid money under orders made without jurisdiction—it being conceded that no statutory limitation period bars the recovery of sums paid since June 4, 1953, if any action for their recovery lies.

I will deal with these issues separately. As to the first: the imprisonments of the plaintiff were all long before the period of one year before the writ. They were periods in the years 1942, 1944 and 1945, and amounted to 193 days in total. The plea of the statute must therefore succeed unless it be that the causes of action did not accrue until later. On October 6, 1954, the Divisional Court made an order that the order of August 18, 1941, and the variation orders, be discharged. Mr. Fox-Andrews submits, in reliance upon section 2 of the Justices Protection

Act, 1848, that the cause of action in the plaintiff based upon false imprisonment only accrued when the Divisional Court made its order—that is to say, on October 6, 1954. As the defendants have not in this litigation challenged that the various orders were made without jurisdiction, and that the orders of committal constituted and resulted in the false imprisonment of the plaintiff, it follows that he must succeed if his cause of action only arose when the various orders were quashed by the Divisional Court. On the other hand, it is clear that the claims for damages for false imprisonment are all barred if the causes of action arose at the times of the respective false imprisonments.

As a necessary preliminary to advancing his submission, Mr. Fox-Andrews invites the court to construe the wording of section 2 so as to add certain words to it. He relies upon the words which are a proviso to section 2. It seems to me that the false imprisonment claim made in the present action is probably covered by the words in the fourth line beginning " or by any act " done under any conviction or order made." Following the opening words come the words of the proviso which my Lord has read. The submission which is made is that the words " or " order " were by mistake omitted. This view is supported by the facts (a) that later in the section occur the words " until " after such conviction or order shall have been so quashed as " aforesaid "; (b) that the section reads very strangely if the words " or order " are not included after the word " conviction "; and (c) that when, in the next year, 1849, a similar enactment was passed which concerned Ireland, the corresponding wording included the words " or order."

Though these submissions have great force, I am not satisfied that they can be accepted. Parliament may have intended to enact that a conviction must be quashed before an action is brought, but may not have intended to enact that an order must be. In Craies on the Interpretation of Statute Law, 5th ed., p. 103, mention is made of the general principle that words are not to be imported into statutes which are not found there; and in *Tinkham* v. *Perry*[46] Evershed M.R. said: " Words plainly " should not be added by implication into a statute unless it is " necessary to do so to give the language sense and meaning in " its context."

Reference may be made to *Reg.* v. *Isle of Ely Justices, Ex parte Gilling*.[47] One Gilling had been taken into custody by railway officials on a charge of having travelled with a false ticket. The following morning he was brought up before the magistrates and was by them remanded in custody until a later day. On that later day it appeared that the charge was groundless and Gilling was discharged. A motion was made in the Queen's Bench for a certiorari to the justices to bring up the warrant under which Gilling had been remanded into custody. The object of the application for a certiorari was to have the warrant quashed preliminary to bringing actions against the railway company and against the magistrates. The court (which presumably included Lord Campbell C.J.) refused the rule. That was on the ground that whatever protection was afforded to the railway company by the warrant ought not to be taken from them, and that in the action against the justices the validity of the warrant was the very thing to be tried; and that section 2 of the Act of 1848, which provides that a conviction shall be quashed before an action can be brought against the committing magistrate, only applied to cases where there had been a conviction.

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[46] [1951] 1 K.B. 547, 549; [1951] 1 T.L.R. 91; [1951] 1 All E.R. 249.

[47] (1855) 4 W.R. 13.

Though the construction of the section presents much difficulty, it seems to me that it cannot be postulated that there was a statutory enactment which had the effect that the orders made by the justices had to be quashed before action could be brought. On this basis the result is that the proviso to section 2 of the Act of 1848 did not debar the plaintiff from suing before the orders were quashed, and the plaintiff was long debarred by the Statute of Limitations from claiming damages in respect of his periods of imprisonment.

But if the contrary view were sustained and it were held that no action could be brought until the orders had been quashed, would the result be any different? Section 2 provides that for any act done under an order made by justices in matters of which they have not jurisdiction or in which they shall have exceeded their jurisdiction there may be an action "in the same "form and in the same case" as might have been maintained before the passing of the Act. Then follows the proviso. If the proviso could be read so as to include the quashing of orders, does the cause of action exist though the right to begin an action is delayed until the orders are quashed, or does the cause of action only arise if and when the orders are quashed?

In deciding this issue it is necessary to consider certain other sections of the Act. Section 8 uses the same expression, "no "action shall be brought," as is found in section 2, and enacts that no action shall be brought for anything done by a justice of the peace in the execution of his office unless commenced within six months after the act complained of shall have been committed. Section 21 of the Limitation Act, 1939, took the place of this section and, therefore, so far as concerns this case, the words to be considered (until the Act of 1954 applied) are the words "the date on which the cause of action accrued." Section 9 provided that no action should be commenced until one month at least after a notice in writing of the intended action should have been given. In such notice the cause of action and the court in which it was intended to be brought was required to be clearly and explicitly stated. That section was repealed in 1894, but it is necessary to consider it when dealing with some of the issues which are before us. If it were assumed that the Act requires the quashing of an order before an action is brought, ought such quashing to have taken place before any notice under section 9—that is to say, a notice stating the cause of action—could be given?

This very question arose in *Haylock* v. *Sparke*.[48] Mr. Haylock was brought before the magistrates and it was charged against him that he had written offensive words on pavements which, it was said, reflected on the character of Mr. Watt, the stationmaster at Ely. Mr. Haylock had written "Donkey Watt. "the Railway Jackass," and Mr. Haylock had continued for some time so to write. It was said that Mr. Haylock's pavement literary efforts were calculated to provoke a breach of the peace. The magistrate ordered Mr. Haylock to enter into a recognizance and to find sureties to keep the peace for three months. Mr. Haylock, having refused to do this, was committed to prison for a period of three months or until he did as ordered. That was on April 30, 1852. On May 6 he was brought up before Coleridge J. by habeas corpus and was discharged. On May 18 Mr. Haylock served a notice under section 9 of the Act of 1848 of his intention to commence an action after one month. On June 12 the warrant of committal issued by the magistrate was brought up by certiorari and was quashed by the Court of Queen's Bench. On June 19 the writ was issued against the magistrate. The claim was for damages for false imprisonment.

The action was heard at the Summer Assizes that year at Cambridge. One of the points taken on behalf of the defendant magistrate was that the notice under section 9 was insufficient because it was not given after the cause of action was completed. Pollock C.B. upheld this contention and a verdict was directed to be entered for the defendant. Upon the argument upon a rule nisi to enter a verdict for the plaintiff for damages which had been assessed it was argued on behalf of the defendant that it was the intention to give to a justice a month's time for the purpose of tendering amends before the action could be brought, and that this intention would be defeated if notice of action could be given before the cause of action was complete, and that the cause of action was not complete until the warrant was quashed. Other issues were involved in the case, but in regard to this issue the reserved judgment of the court, delivered by Lord Campbell, included the passage to which my Lord has already referred and which I will not re-read.

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[48] 1 E. & B. 471.

In the second sentence Lord Campbell said this[49]: "Supposing this warrant to be in the nature of a conviction, so that the action could not have been maintained unless the warrant had been quashed, we think that the notice of action was regularly given on May 18." It seems to me that Lord Campbell, in saying: "Supposing this warrant to be in the nature of a conviction, so that the action could not have been maintained unless the warrant had been quashed," was indicating his view that quashing was only necessary if there were a conviction. This also seems to be implicit in the remainder of the passage of the judgment dealing with this matter, which has been read. It concludes with these sentences: "In argument it was contended that the six months might be construed to run from the quashing of the conviction; but the commitment is the act complained of, not the quashing of the conviction on the application of the party imprisoned. The quashing of the conviction is only a condition to the prosecution of the action like the delivery of an attorney's bill, or the giving a notice of action: and there is nothing to determine in what order the conditions shall be complied with."

I consider that that judgment and its reasoning should be followed. It was referred to in this court in *West Riding of Yorkshire Rivers Board* v. *Robinson Brothers*,[50] where its correctness was not challenged.

Lord Campbell had referred to the quashing of a conviction as only a condition to the prosecution of an action comparable with the delivery of an attorney's bill. In *Coburn* v. *Colledge*,[51] in this court, it was held that in the case of a solicitor's costs the cause of action arose when the work was completed, and that the period of limitation began to run from that time although there was a statutory provision that no action should be commenced or maintained until the expiration of a month after the delivery of a bill of costs. It was held that that provision dealt, not with the right of the solicitor but with the procedure to enforce that right. Lord Esher M.R. said [52]: "It does not "provide that no solicitor shall have any cause of action in "respect of his costs or any right to be paid till the expiration of "a month from his delivering a signed bill of costs, but merely "that he shall not commence or maintain any action for the "recovery of fees, charges, or disbursements until then." So in the present case the proviso is that no action shall be brought until after a conviction shall have been quashed.

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[49] 1 E. & B. 471, 484.

[50] [1907] 1 K.B. 431.

[51] [1897] 1 Q.B. 702.

Some reliance was placed, on behalf of the plaintiff, upon the language of section 12. That section was repealed in 1893, but it is valid to have regard to it when considering the question as to when a cause of action arose. It was argued that a cause of action consists of every fact which it would be necessary for a plaintiff to prove, if traversed, in order to support his right to the judgment of the court. Reference was made to the definition given by Lord Esher M.R. in *Read* v. *Brown* [53] and to which he adhered in his judgment in *Coburn* v. *Colledge*.[54] But section 12 of the Act of 1848 was, in my judgment, a procedural section. The requirements of proof which were referred to were not "facts" of the kind referred to by Lord Esher. Furthermore, the section uses the phrase "or if he shall not prove the cause "of action referred to in the notice." This, as I think, distinguishes the procedural requirements from the cause of action itself. Furthermore, the Act of 1848 was an Act designed (as its title states) to protect justices from vexatious actions for acts done by them in the execution of their office; and section 2 was not creating new causes of action. The purpose of the Act was to assist justices by enacting that certain steps should be taken before commencing actions and by fixing a time limit within which such actions should be brought.

It seems to me, therefore, that it cannot be said that causes of action only accrued when the Divisional Court on October 6, 1954, discharged the original order and the variation orders. It is to be noted that the orders of committal were not in terms quashed or discharged. It further seems doubtful whether, since there was nothing that could be called a conviction, the orders need have been discharged before an action was brought. But even if it was necessary to have discharged the original order and the variation orders, and even if, by their discharge, the committal orders (which were spent orders in the sense that the periods of committal which they ordered were long past) could be said also to have been discharged, the causes of action for damages for false imprisonment were not dependent for their existence upon the quashing or discharge of any order. I consider, therefore, that all causes of action which accrued before June, 1953, are barred as a result of the application of the provisions of the Limitation Act, 1939.

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[52] [1897] 1 Q.B. 702, 706.

[53] 22 Q.B.D. 128.

[54] [1897] 1 Q.B. 702, 706.

This brings me to the remaining issue raised in the appeal. If any causes of action later accrued—that is to say, after June 4, 1953—they are not barred. It has therefore to be considered whether there were any causes of action which accrued. The only suggested causes of action referable to this later period relate to the fact that the plaintiff paid money to his wife. It is said that he paid her money because he was wrongly ordered to do so by magistrates, who had acted outside their powers, and that he paid in this period because, having previously been sent to prison for non-payment, he knew that he would again be sent to prison if he did not pay. It is said, therefore, that he paid under the fear or threat of what would happen to him if he did not pay. It is further said that he can recover what he paid by way of damages from the magistrates who irregularly ordered him to pay.

The claim is, I think, advanced either under the wording of section 2 of the Act of 1848 or independently of that wording. The opening wording refers either to "any act done by a justice "of the peace" or to "any act done under any conviction or "order made or warrant issued by such justice." The wording suggests that an act done is something separate and different from a conviction or from an order or from a warrant. In the present case the complaint relates to the order or orders made by the justices. But it does not seem to me that the mere making of an order caused injury to the plaintiff.

In *Polley* v. *Fordham*[55] the plaintiff had been convicted by a metropolitan police magistrate of an offence on February 11, 1903, and fined. He failed to pay the fines and the magistrate issued a warrant of distress against his goods. Distress was put in on April 17. The plaintiff, under protest, paid out the distress on April 29. On July 8 the conviction was quashed, on the

[55] [1904] 2 K.B. 345.

ground that the information had been out of time. The plaintiff brought an action in the county court against the magistrate on August 26, claiming damages for illegal distress. The question being considered on appeal from the county court judge was whether the time limit for the purposes of the Public Authorities Protection Act, 1893, ran from the date of conviction (February 11, 1903) or from the date of entry on the plaintiff's premises. It was held that time only ran from the latter date. In argument counsel for the defendant (the respondent) submitted that it was the conviction which was the act complained of, and it was in reference to that submission that Wills J. in his judgment said[56]: "It seems to me the act complained of is "the distress and nothing else. No such thing was ever heard "of as an action for making an order against a person without "jurisdiction. If the order is not followed by consequences "against the individual, it comes to nothing. Actions for illegal "distress of one sort or another were at one time very common, "but such actions were always actions of trespass"; and, at the end of his judgment, "But the action itself was not for "erroneous exercise of jurisdiction, but was for making a distress "and breaking and entering a man's premises where there was "no right to do so. No such action as that suggested by the "respondent will be found in Bullen and Leake; in Chitty on "Pleading; or in any of the books of precedents."

So here, when the original order was made, or when the variation orders were made, no injury to the plaintiff was then caused. If the first payment had become due on a date later than the date of the order, no immediate injury to him was caused by the order itself. His loss or injury came when he paid. But the payment by him was not an "act done by" the justices; nor does it seem to me that it was within the words "any act done under any . . . order made." The wording of the statute seems to me to refer either to something directly done by justices or to something directly done by others as against the person complaining. I do not think that the words are apt to refer to a payment made by a person against whom an order has been wrongly made. The wording refers rather to some such acts as trespass to person or trespass to goods done either by justices or by others who derive their authority, or purport to derive it, under any conviction or order made or warrant issued by justices. This is, I think, also only reasonable. The whole case of the plaintiff is that the orders made were nullities and that he need not have paid. Payments made by him in these circumstances do not readily fit into the notion of acts done by justices. The justices may not have realized that the orders they made were beyond their powers; but any ignorance on their part is of no account. From the point of view of the plaintiff he, too, may not have realized that the orders were irregular. But he in fact had remedies open to him by availing himself of which he could have set aside the orders. The fact that he for the most part went on paying does not convert his payments into acts done within the wording of the section.

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[56] [1904] 2 K.B. 345, 348.

But the matter falls to be considered apart from the precise wording of section 2 of the Act. Although the Act is one giving protection to justices and is not one that (at least in section 2) is giving new remedies against justices, it is, I think, correct to say that in circumstances where, before 1848, there could have been a cause of action against justices, that cause of action would continue, subject to complying with any requirements laid down by the Act. Actions could be maintained (as section 2 states) "in the same form and in the same case" as might have been before the passing of the Act. Though new causes of action are not given by section 2, neither, in my view, are causes of action denied which might theretofore have lain; but certain defined conditions must be met with compliance. If, however, in the circumstances of this case, a right of action would have existed before 1848 against justices in respect, not of any false imprisonment, but merely because money was paid as ordered, then such a right of action would at later times and at the present time also exist. If there was and is such a cause of action known to English law, then the plaintiff in the present case could avail himself of it. The claim made in the writ, apart from that for damages for false imprisonment, was for damages for acts done by the defendants without jurisdiction while sitting as justices of the peace. The statement of claim pleaded the facts and by the prayer claimed damages. It is said that if justices made an order requiring the payment of money to a third party and made such order in excess of their jurisdiction, an action on the case would lie against the justices for the amount of any sums actually paid. But no precedent for any such action was cited.

In *Sommerville* v. *Mirehouse*[57] the plaintiff complained in an action against magistrates that he had been summoned before them for non-payment of a church rate, and he complained that though he had proved that the rate had been demanded at a date more than six months before he was summoned, and that he was by statute protected from having an order made against him, yet an order for payment had been made. That order was later quashed by the Queen's Bench. In his action the plaintiff said that the magistrates had made the order without jurisdiction, and that he had been put to inconvenience and annoyance, and had incurred expense in applying for a writ of certiorari. The magistrates said that there had been evidence of a later demand upon the plaintiff. The headnote of the case states that, upon demurrer, it was held "that it was within the duty of the defen-"dants, as justices, to determine the question whether a "complaint was made within the time limited; and therefore, "by section 1" of the statute "the action was not maintainable "without proof of malice and want of reasonable and probable "cause." Counsel had said: "The costs of bringing up the "order for the purpose of quashing it constitute a damnum "absque injuria." Cockburn C.J., in the course of the argument, said[58]: "It was within the duty of the justices to determine the "question which was raised in this case before them: indeed "that question was a matter which they were bound to decide"; whereupon Hill J. said[59]: "If anything had been done under "the order it might be different; as soon as an invalid order is "acted upon a trespass is committed"; and later Hill J. said: "There is no injuria until a seizure of the plaintiff's goods is made "in execution of the order."

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[57] 1 B. & S. 652.

There are many cases in the books where actions have been brought against justices, but they have been brought because a plaintiff has been detained or because his goods have been seized or in similar circumstances. If a man is imprisoned, then lawful authority for his detention must be forthcoming; if it is not, then justices who have wrongly ordered his detention may be liable. Where a man is wrongly imprisoned and has to make payments before he can be released, then the amount of such payments may be recovered as part of his damages (see *Clark* v. *Woods, Smith and Cooper*,[60] *Norton* v. *Monckton*,[61] and see section 13 of the Act of 1848). But the right of action comes about by reason of the trespass to the person: the wrongful or abortive order is of no avail to justify what has been done. It is not the mere making of the order that constitutes the cause of action. If the order is one for the payment of money and if it is made without jurisdiction, then it need not be obeyed. Appropriate steps can be taken to quash it or to reverse it on appeal. But it does not seem to me that if these steps are omitted a claim for damages can later be presented against justices based merely on the fact that they made an order requiring payments to be effected. I would dismiss the appeal.

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[58] 1 B. & S. 652, 656.

[59] Ibid. 657.

[60] 17 L.J.M.C. 189.

[61] 43 W.R. 350.

Romer L.J. The date of the last of the three orders for the committal of the plaintiff to prison was May 23, 1945, and I understand that under that order he was imprisoned on July 20, 1945, and was released in the following October. In these circumstances, it is clear that his cause of action for damages for false imprisonment was defeated by the Limitation Act, 1939, years before he issued his writ, unless he is right in the contention, which Mr. Fox-Andrews submitted on his behalf, that his right to sue did not arise until the Divisional Court quashed the original and subsequent orders of the magistrates on October 6, 1954. This argument is founded upon the proviso to section 2 of the Act of 1848.

In considering Mr. Fox-Andrews' contention as to the effect of this proviso, it is necessary to bear in mind that there is a real distinction between having a cause of action on the one hand and being able to obtain judgment on it on the other; for the right to judgment may well involve some element which is additional to the vesting of the cause of action itself. For example, A sues B for money lent; B pleads the Limitation Act; A has a perfectly good cause of action, but he will not recover judgment unless he can prove at the trial some circumstance which takes the case out of the operation of the Act. The distinction was put quite clearly by Lord Esher M.R. in his judgment in *Coburn* v. *Colledge*.[62] The question therefore arises in the present case whether the quashing of an invalid order under section 2 of the Act of 1848 constitutes an essential part or ingredient of an action against the magistrates who made it, so that no cause of action arises until such quashing has been effected, or whether a complete cause of action arises when the consequences of the order are felt and the quashing is a mere condition precedent to the plaintiff's right to judgment.

It is not permissible to construe the proviso to section 2 in the light only of its immediate context; its meaning and effect must be ascertained both with regard to that context and with regard to the provisions of the Act as a whole. The Court of Queen's Bench in *Haylock* v. *Sparke*[63] rejected the view that no cause of action arises under the Act of 1848 in respect of a conviction made without jurisdiction until the conviction has been quashed; and I have no reason to doubt the accuracy of that decision. It was considered in this court in *West Riding of Yorkshire Rivers Board* v. *Robinson Brothers*,[64] and none of the members of the court expressed any doubt or disapproval of the decision. Farwell L.J. indicated that Lord Campbell and his brethren decided the case mainly by reason of the limitation section of the Act of 1848, section 8; and this would certainly seem to emerge from the language of Lord Campbell's observations.

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[62] [1897] 1 Q.B. 702.

[63] 1 E. & B. 471.

I think that additional support for the decision in *Haylock* v. *Sparke* [65] is to be found in the provisions of section 7 of the Act. Section 7 is in the following terms: "In all cases where by this Act it is enacted that no "action shall be brought under particular circumstances, if "any such action shall be brought it shall be lawful for a judge "of the court in which the same shall be brought, upon application of the defendant, and upon an affidavit of facts, to set "aside the proceedings in such action, with or without costs, "as to him shall seem meet." The effect of that section on section 2 would appear to be that an action can properly be commenced in respect of an invalid conviction before the conviction has been quashed, but a judge can—not "must," be it noted—set aside the proceedings upon application by the defendant if the plaintiff does not obtain the quashing of the conviction. This seems to show that in the contemplation of Parliament the right of action—that is, the right to sue—precedes the setting aside of the conviction.

The position in this respect may be contrasted with that which arises under the statute of 7 Anne, c. 12, s. 3, which was considered in *Musurus Bey* v. *Gadban*.[66] That section provides that: ". . . all writs and processes that shall at any time hereafter be "sued forth or prosecuted, whereby the person of any ambassador ". . . authorized and received as such by Her Majesty, her "heirs or successors . . . may be arrested and imprisoned, or "his goods and chattels may be distrained, seized, or attached, "shall be deemed and adjudged to be utterly null and void to all "intents, constructions and purposes whatsoever." If section 7 of the Act of 1848 had been couched in language similar to that of the statute of Anne, considerable support would be afforded to Mr. Fox-Andrews' contention. The section, however, in its enacted form, seems to me to be very much opposed to it. I am accordingly unable to accept Mr. Fox-Andrews' argument on this part of the case, for *Haylock* v. *Sparke*,[67] which is fatal to it, was, in my opinion, rightly decided.

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[64] [1907] 1 K.B. 431.

[65] 1 E. & B. 471.

[66] [1894] 2 Q.B. 352; 10 T.L.R. 493.

In these circumstances, it becomes unnecessary to express any concluded opinion upon Mr. Fox-Andrews' further point that the words " or order " in the proviso to section 2 were omitted by mistake. I am inclined, however, to accept Mr. Fox-Andrews' submission on this point. Section 2 is concerned not only with acts done by justices in their criminal jurisdiction but with acts done in the exercise of their civil jurisdiction as well. It is further to be observed that the words " conviction " and " order " in the section are used disjunctively wherever they appear. In these circumstances, I think it is difficult to avoid an absurdity in the operation of the section unless the words " or order " are implied after the words " until after such conviction " in the proviso. In the absence of such implication the proviso would read (in relation to an order made where no question of any conviction arises at all) " Provided, nevertheless, that no such " action shall be brought for anything done under such order " until after such conviction shall have been quashed," which does not, as it seems to me, make any sort of sense. Moreover, the phrase which appears later in the section, " until after such " conviction or order shall have been so quashed as aforesaid " indicates that the earlier reference to quashing was intended to cover orders as well as convictions. Therefore, my provisional view is that there is sufficient justification for the assumption that the words " or order " were omitted from the proviso through inadvertence; and some support for that is to be found in the corresponding section of the Justices Protection (Ireland) Act, 1849, to which my Lord has referred.

The next issue is whether the plaintiff can recover from the justices, or some of them, the whole or any part of the money which he paid to his wife in compliance with the orders which were made against him. So far as section 2 of the Act of 1848 is concerned, the question arises: Was the plaintiff a person injured (a) by any act of the justices done without jurisdiction, or (b) by any act done under an order made by the justices without jurisdiction? If so, and subject to the Limitation Act, 1939, he could sue the justices " in the same form and in the same case as he might

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[67] 1 E. & B. 471.

" have done before " 1848, without alleging malice or absence of reasonable and probable cause. The actual injury or detriment which the plaintiff sustained was the payment to his wife, over a period of years, of money which in fact he was under no liability to pay. There can be no doubt that he made these payments as a consequence of the original order of August 18, 1941, and of the various orders which succeeded it. On analysis, however, it seems to me that the payments resulted from at least three different factors, namely: (1) the making of the orders; (2) the plaintiff's ignorance of the invalidity of the orders; and (3) his consequent failure to apply to a higher court to have them set aside.

Of these three elements the only one which can fairly be described as an " act done by a justice " without jurisdiction, or as an " act done under any order made by " a justice without jurisdiction is the first, videlicet, the making of the orders. The making of the orders, however, did not in itself deprive the plaintiff of any moneys at all; and, indeed, in *Polley* v. *Fordham*[68] Wills J. said: " No such thing was ever heard of as an " action for making an order against a person without jurisdic- " tion. If the order is not followed by consequences against " the individual, it comes to nothing." One therefore finds that the only contributory cause of the plaintiff's loss which can be regarded as an act of the justices done without jurisdiction was one which, in itself, took no money from his pocket and gave the plaintiff no cause of action. On the other hand, the other contributory causes which I have mentioned cannot, as it seems to me, give such a cause of action because they were not acts of the justices at all.

Moreover, I cannot help feeling that the plaintiff's ignorance of the invalidity of the orders and his resulting compliance with them are matters in respect of which he cannot excuse himself from blame; for the original order, of which he was given a copy, stated on its face that it was made with his consent and he knew perfectly well that in fact he never had consented. This fact in itself would surely have conveyed to the mind of most reasonable men that there was something wrong with the order, although this did not apparently occur to the plaintiff himself. I accordingly cannot think that the aggregate of causes which led to the plaintiff making these payments to his wife can reasonably be regarded as constituting an act done by the justices without jurisdiction; and if I am right in this the plaintiff has no cause of action such as was envisaged by section 2 of the Act of 1848.

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[68] [1904] 2 K.B. 345, 348.

It is, of course, true that section 2 of the Act did not confer rights of action against magistrates who acted without or in excess of jurisdiction; for such rights existed already; and Mr. Fox-Andrews, whilst invoking the section in an effort to escape the effect of the Limitation Act, said that the plaintiff's claim to pursue the magistrates for the money that he had paid to his wife was founded upon the common law. The kind of principle upon which he relied is stated in Comyns' Digest, vol. 1, p. 278 (Action upon the Case) in the following way: "In all cases where a man "has a temporal loss or damage by the wrong of another he "may have an action upon the case to be repaired in damages." What I have already said, however, with regard to causation applies equally to this proposition as to the language of section 2 of the Act; and for the reasons I have stated, the loss which the plaintiff suffered was not in my opinion occasioned by the wrong of the justices, although the invalid order which they made was undoubtedly one of the causes which contributed to the loss. If it be objected that the views which I have expressed upon this issue are too narrow in relation to cause and effect, the answer is that I do not think that a man who is aggrieved by an invalid order of justices was intended, either at common law or under the Act of 1848, to have the option either of appealing or of obeying it and then suing the justices for damages; and if (as in the present case) an aggrieved person can obviate all damage by appealing, then his remedy is to appeal.

Apart from the question of causation, a further difficulty in the way of the plaintiff's money claim against the magistrates arises from the reference or provision in section 2 to the form in which actions against magistrates might be brought. By reason of that provision it would seem that after 1848 magistrates who acted without jurisdiction could only be sued under forms of action which existed before the Act. These forms would presumably include actions on the case, but, notwithstanding the extreme diligence of counsel, no report of an action against magistrates comparable or even analogous to the present money claim is to be found in the books. This is the more significant in that a number of actions in trespass against justices are reported previous to 1848; and I think it is a reasonable inference that the reason why no claims such as the present were reported is that there were none to report.

The nearest case to which our attention was drawn was *Beaurain* v. *Scott*,[69] in which an action on the case was successfully brought for damages against a judge of the Ecclesiastical Court for wrongful excommunication. In that case, however, the injury done to the plaintiff was immediately due to the issue of the decree of excommunication and could not be remedied by appeal, and that element, as it seems to me, makes a very considerable difference. It is, however, perhaps sufficient to say that in my judgment Mr. Fox-Andrews has not established that a claim against justices such as Mr. O'Connor has now brought would have been entertained before the passing of the Act of 1848 and, accordingly, in my judgment, such a claim ought not to be entertained now.

For these reasons, and those stated by my brethren, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *George C. Carter & Co.; Wilkinson, Howlett & Moorhouse.*

A. W. G.

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[69] 3 Camp. 388.

BROWN AND OTHERS *v.* DIRECTOR OF PUBLIC PROSECUTIONS.

1956
April 17.

Lord Goddard C.J.,
Cassels and Donovan JJ.

Local Government—Meeting of local authority—Voting—Members of local authority also tenants of council houses—Whether permitted to vote against their pecuniary advantage on matters affecting rents of council houses—"Pecuniary interest"—Meaning—Whether houses provided by local authority a "service"—Local Government Act, 1933 (23 & 24 *Geo.* 5, *c.* 51), *s.* 76 (1) *and proviso.*

A resolution moved at a council meeting of a local authority provided that a "lodgers' allowance" hitherto payable by tenants of council houses who took in lodgers or sublet should cease to be payable except where the tenants were also members of the council. Before the motion was put to the meeting, an amendment was moved to delete the words relating to tenants who were also councillors so as to put them on the same footing as other tenants. Six councillors who voted against the amendment (which was defeated) and in favour of the substantive resolution were themselves tenants of council houses. Three of the six had no lodgers in their respective houses. Before voting all had declared their interest as council tenants:—

Held, (1) that members of a local authority who were tenants of council houses had a pecuniary interest in any matters affecting the rents of such houses and were debarred by the terms of section 76 (1) of the Local Government Act, 1933, from voting on any matter relating to the conditions of the tenancy as to rent or any pecuniary obligation on either side, whether the result of the vote was for or against their pecuniary advantage;

(2) that housing provided by a local authority was not a "service" within the meaning of the proviso to section 76 (1); and

(3) that it was immaterial that three of the councillors concerned had no lodgers in their respective houses at the time that they voted, as, for the reasons given in (1) above, they had a pecuniary interest in the subject-matter of the resolution and the amendment and so were debarred from voting thereon.

CASE STATED by Northampton justices.

On May 23, 1955, informations were preferred on behalf of the Director of Public Prosecutions against the appellants, John Arthur Brown, Frederick Patrick Saunders, Caroline Mary Trusler, Kathleen Maud Gibbs, Philip McShane and Sydney Thomas Kinch, alleging that on April 4, 1955, each of them, being a member of a local authority and having a pecuniary interest in additional payments by council tenants in respect of lodgers, and being present at a meeting of the council at which additional payments were under consideration, voted thereon contrary to section 76 of the Local Government Act, 1933.[1]

The justices heard the informations on July 25, 1955, and found the following facts: Each appellant was a member of the Northampton County Borough Council and was present at a meeting of the council held on April 4, 1955. Each appellant was on April 4, 1955, a tenant of a dwelling which was the property of the council. The council owned approximately 8,000 houses and operated a points scheme for the selection of tenants thereof, the population of the borough being approximately 104,000. Three of the appellants, namely, John Arthur Brown, Caroline Mary Trusler and Kathleen Maud Gibbs, had lodgers in their respective dwellings on April 4, 1955. At the council meeting a resolution was moved for the adoption of the following recommendation made by the housing committee on March 21, 1955: "That except in the case of tenants of council dwellings who are "members of the council, the requirements contained in recom"mendation (2) of paragraph 8 of the report of the housing "committee of February 15, 1954, that tenants of council houses "who sublet or take a lodger or lodgers shall make payments to "the council in respect thereof, shall cease to operate as from "May 2, 1955; and that the council's resolution to the said "paragraph 8 be varied accordingly." The following verbal amendment was then moved: "That the words 'except in the "'case of tenants of council dwellings who are members of the "'council' be deleted from the recommendation." Each of the appellants then declared his or her interest in the matter as a tenant of the council and the town clerk drew attention to the provisions of section 76 of the Local Government Act, 1933. The amendment was put to the meeting and each appellant voted against it. (The amendment was defeated.) The resolution, embodying the housing committee's recommendation, was then put to the meeting and each appellant voted in favour of it.

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[1] Local Government Act, 1933, s. 76: "(1) If a member of a local "authority has any pecuniary interest, "direct or indirect, in any contract "or proposed contract or other matter, "and is present at a meeting of the "local authority at which the con- "tract or other matter is the subject "of consideration, he shall at the "meeting, as soon as practicable after "the commencement thereof, disclose "the fact, and shall not take part in "the consideration or discussion of, "or vote on any question with "respect to, the contract or other "matter:

"Provided that this section shall "not apply to an interest in a con- "tract or other matter which a "member may have as a ratepayer "or inhabitant of the area, or as an "ordinary consumer of gas, electricity "or water, or to an interest in any "matter relating to the terms on "which the right to participate in any "service, including the supply of "goods, is offered to the public."

It was contended before the justices on behalf of the appellants (a) that housing was a service offered to the public which came within the proviso to section 76 (1) of the Act; (b) that when voting on the amendment and on the substantive resolution, the appellants had no pecuniary interest in the matter in that they were merely subjecting themselves to a specific pecuniary detriment; (c) that notwithstanding the position of the three other appellants, Frederick Patrick Saunders, Phillip McShane and Sydney Thomas Kinch, having no lodgers in their respective council dwellings on April 4, 1955, had no pecuniary interest in either the amendment or the substantive resolution.

It was contended for the respondent (a) that the proviso to section 76 (1) of the Act did not apply; (b) that each of the appellants had a pecuniary interest as a council house tenant in any matter affecting the conditions of tenancy of council houses, and that each of them specifically had such an interest in the amendment.

The justices were of opinion that, by voting, each of the appellants had committed an offence contrary to section 76 of the Act. They fined each appellant £2. All the appellants appealed.

Sir Hartley Shawcross Q.C. and *Miss J. Graham Hall* for the appellants. The question is to what extent and in what circumstances a councillor who is also a tenant of a council house is precluded by section 76 (1) of the Local Government Act, 1933, from voting in matters which affect council house policy and possibly affecting his own house. The question has to be considered in the light of the proviso, as that exempts from the operation of the subsection matters relating to services offered by the local authority to the public. There are two important aspects of this matter. (1) The Act is directed against any suspicion of corruption in local authority affairs. On the other hand, it is fundamental that it should be administered in a way which does not bring it into disrespect and in a way which will promote its object. There is here no suggestion of corruption. All the appellants acted honourably. They declared their interest and cast their votes in a way which would operate to their detriment and not to their advantage. This is a test case, so that legislative policy can be considered in the light of the court's decision. (2) There is an increasing degree of municipal housing. In Northampton more than a quarter of the population is now housed in municipal houses. Some wards consist wholly of a municipal housing estate. The practical question which arises, therefore, is whether a councillor elected from such a ward, being of necessity a person living in a council house, is precluded from voting on matters affecting council house policy.

On the stated case the following points arise: (1) Is municipal housing a service for the purpose of the proviso to section 76 (1)? (2) If it is not, in a case where a substantive resolution before the council does not involve any pecuniary interest on the part of the councillors, is a councillor entitled to vote against an amendment to the resolution which, whilst not in itself affecting his pecuniary interest, would, if carried, amend the substantive resolution in such a way as to make that resolution one which would affect his pecuniary interest? (3) On the facts of this case did all the councillors concerned have a pecuniary interest for the purpose of section 76 (1)?

[LORD GODDARD C.J. On your first point, if housing is a service then every landlord who offers houses to tenants is offering a service.]

[Donovan J. Rent is a quid pro quo for the use of the house.]

That may be one meaning, but it is submitted that something much wider was intended. Under their statutory powers local authorities have power to sell furniture and fittings for council houses. That clearly falls within the proviso. It would be odd if councillors who are tenants were entitled to vote freely on such matters and yet not be entitled to vote on matters concerning the houses themselves.

[Lord Goddard C.J. We have to consider the words "right "to participate" which occur in the proviso. A ratepayer has no right to a house. If he had a right to participate in the housing service he would have a right to demand a house.]

Any person has a right to go to the council and ask for a house. Whether he gets one or not depends upon whether one is available. It can not be doubted that education is a public service, but it is for the local authority to decide, in its discretion, whether a grant for higher education shall be given or not. The provision of a market is a public service, but there is no doubt that a local authority can refuse a stall in a market.

[Donovan J. Fundamentally this is a question of construction, the question being whether a person renting a house from a landlord is accepting a service in the ordinary understanding of that word.]

Housing is just as much a service as the provision of a library or education facilities, or hospitals, although not every member of the public is admitted. In most of the services the demand exceeds the supply and to meet the demand the local authority lays down some order of priority. Here there was a points scheme. Housing may be none the less a service because it does not meet all the demands at the same time. In these days housing is regarded as a public service and is commonly understood to be so by the man in the street. That is the way in which the statute should be construed.

Assuming that housing is not a service for the purposes of the proviso to section 76 (1), then it is submitted that the votes cast by the appellants cannot have affected their pecuniary interest. Once the resolution, unamended, was passed the effect was that the rent and lodgers' allowance payable by them would remain the same, whereas in the case of tenants who were not councillors it would be less.

[Lord Goddard C.J. Is there not a pecuniary detriment?]

There is no distinction drawn in section 76 (1) between pecuniary detriment and pecuniary interest, but it is submitted that a person cannot be pecuniarily affected unless his pocket is affected. If the resolution was a general one relating to the rents of the houses and affecting all the houses then it is conceded that a councillor who was a tenant could not vote, but if he is excluded from the effect of the resolution then he cannot have a pecuniary interest in it.

[Lord Goddard C.J. This may be a matter to be considered by the legislature.]

Finally, whatever the position regarding the three appellants who had lodgers at the time that the resolution was passed, it is different in the case of those who had no lodgers. The result was a matter of indifference to them. The mere possibility that at some future date the vote might result in a benefit to a councillor is not sufficient to create a pecuniary interest on the part of that councillor. This is a penal statute, and if the court were to say that a man has a pecuniary interest because at some future date he might get a benefit, it opens the door very wide. The appeals should be allowed.

Sir Harry Hylton-Foster Q.C., S.-G., Neil McKinnon and *Paul Wrightson* for the Director of Public Prosecutions were not called on.

Lord Goddard C.J. This is a case stated by justices for the County Borough of Northampton, before whom six persons were summoned on informations preferred by the Director of Public Prosecutions for that each of them " being a member of a local " authority and having a pecuniary interest in additional payments by council tenants in respect of lodgers and being " present at a meeting of the said council at which additional " payments were under consideration, voted thereon contrary to " section 76 of the Local Government Act, 1933."

Let me say at once that there is no suggestion in the present case of any corruption or improper motive on the part of the appellants, and the justices, in convicting them, only inflicted a nominal fine because they recognized that there was no dishonesty or corrupt motive in the appellants in voting as they did. The simple question is whether or not the vote they gave on the occasion in question was contrary to section 76 of the Local Government Act, 1933. It is no doubt of the greatest possible importance that there should be a strict observance of the Act.

1956

Brown v. Director of Public Prosecutions.

Lord Goddard C.J.

It seems that at a particular meeting the question under discussion was whether the residents in council houses, that is to say, houses owned by the borough council and let to various inhabitants of Northampton, should pay an extra rent to the council if they sublet or took in lodgers. Apparently, at that time, there was in force a provision that those persons who did sublet or take in lodgers should pay, and they were paying, an extra rent to the council. It was then proposed: "That except "in the case of tenants of council dwellings who are members "of the council the requirements contained in recommendation "(2) of the paragraph 8 of the report of the housing committee "of February 15, 1954, that tenants of council houses who sublet "or take a lodger or lodgers shall make payments to the council "in respect thereof, shall cease to operate." If that resolution had gone through, the effect would have been that persons who were not borough councillors but who occupied council houses would not have to pay if they sublet or took in lodgers, but members of the council, if they had council houses, would have to pay the extra levy. An amendment was then moved: "That "the words 'except in the case of tenants of council dwellings "'who are members of the council' be deleted from the recommendation." That would put the members of the borough council on the same footing as other council tenants, and if it had been carried it would, of course, have been of pecuniary benefit to the members of the council who were tenants of council houses. It is right to say at once that the appellants who were summoned voted against the amendment, so that they were not voting in favour of their obtaining a pecuniary advantage.

The first point to be considered is whether it makes any difference that they get any pecuniary advantage or disadvantage. [His Lordship read section 76 (1) of the Local Government Act, 1933, and continued:] These six persons did disclose their interest, but they did vote.

It seems to me that section 76 (1) is drawn in such terms that it does not matter whether the result of the vote would be to the pecuniary interest or disinterest of the person voting. Parliament has not said that they may vote against their interest and not for their interest; it has said that they must not vote on any matter in which they have a pecuniary interest. I cannot see that it can be said that councillors who are tenants of council houses and who are paying the rent of those houses have not a pecuniary interest. It seems to me that they have. Therefore, if any question arises with regard to the rents of those houses, I think that they must not vote. That is the only construction which I can put upon the very wide terms of section 76 which, it will be observed, relates not only to "direct interest" but to "indirect interest." I think that Parliament has laid down that on any matter in which a member of a local authority has a pecuniary interest—and he undoubtedly has a pecuniary interest if he is paying rent for a house owned by the council—he should not vote at all, and it is no answer to say: "The vote which I "recorded was a vote against my pecuniary interest." The answer to that is: "It was a vote in respect of your pecuniary "interest, and you must not vote at all."

The next matter to be considered is this: Section 76 (1) contains a proviso "that this section shall not apply to an "interest in a contract or other matter which a member may "have as a ratepayer or inhabitant of the area, or as an ordinary "consumer of gas, electricity or water, or to an interest in any "matter relating to the terms on which the right to participate "in any service, including the supply of goods, is offered to "the public." Sir Hartley Shawcross has submitted that housing is a service. In one sense, no doubt, it is nowadays regarded as a social service, but it does not seem to me that we can say that the provision of a house is a service within the terms of this proviso. A landlord who has houses to let is not as a rule regarded as rendering a service. He has houses which, as a commercial proposition, he is willing to let to tenants; and a tenant who rents a house is not as a rule said to be taking advantage of a service. He is the tenant of a house for which he pays a rent. I think that participating in any service refers to far different matters, the services which a local authority provides for the public, not the provision of a house in which a person may live. Another matter which has influenced me in coming to a conclusion is that the words used in the proviso are "an interest in any matter relating to the "terms on which the right to participate in any service . . . is "offered to the public." "Right" must mean legal right. I cannot see that a ratepayer or any other person has a right to acquire a house. He may get a house if the local authority chooses to let him have one. Once the local authority lets a person have a house no doubt it has to provide services, sanitary and otherwise, in the same way that a person is entitled to become an ordinary consumer of gas or water, because once a man is occupying a house in the area supplied by a gas or water board, he has a right to demand those services. I think that that point also fails.

The last point taken by Sir Hartley was that three of the appellants had no lodgers in their respective houses at the time when they voted, and therefore he argued that they had no pecuniary interest in the matter under discussion, and that it is not enough to say they might take in lodgers at some future date. I think that the answer to be made to that is the same as the answer made to the first point, that the resolution concerned the rents of council houses, and councillors who are tenants of council houses must abstain from voting on any matter relating to the rents of council houses. It is true that anomalies may occur—if they are really anomalies, though I do not think they are—for instance, councillors might vote on those matters knowing, perhaps, that in a few months time they might themselves be the occupiers of council houses and pay rent to the council. One cannot deal with every point which arises, but if a person occupies a council house, I think that he is debarred by the terms of section 76 from voting on any matter relating to the conditions of the tenancy as to rent or any pecuniary obligation on either side.

For those reasons I think that the justices came to a correct decision and the appeals fail.

Cassels J. I agree. I am satisfied that the action taken by the appellants, though bona fide, was in conflict with section 76 of the Act. I should be prepared to hold that housing is not a service within the meaning of the proviso. I think it is an activity on the part of the local authority, and if a councillor happens to be the tenant of a council house, it is quite clear that section 76 (1) precludes him from taking part in any discussion concerning the rent of council houses. I have nothing further to add.

Donovan J. I agree with what the Chief Justice and Cassels J. have said about the construction to be put on the word " service " in the proviso to section 76 (1).

With regard to the other matters, the effect of the amendment would have been that three of the appellants would be under no liability to make the additional lodgers' payment and to free the other three from a future liability to do so should they ever, as regards the council house which each occupied, decide to take in lodgers or sublet. That being so, in my view, the amendment was a matter in which all the appellants had a pecuniary interest, and they all voted upon it. It is true that they voted against it, but section 76 (1) prohibits them from voting at all.

As regards the substantive resolution, the position is this: the council was voting to free all tenants, other than councillor tenants, from the liability to make future additional payments in respect of lodgers or subletting. The councillor tenants here concerned voted in favour of that proposal, and therefore voted to preserve their own liability, actual or possible. The object of section 76 (1) is clearly to prevent councillors from voting on a matter which may affect their own pockets and which may therefore affect their judgment; and a councillor's judgment may be affected by a proposal to preserve his liability just as much as by a proposal to terminate it, particularly where other persons in a like situation are being relieved from the same liability. In those circumstances, no narrow construction ought to be put upon the words "pecuniary interest" in their context in section 76 (1); in particular, they ought not to be construed—and the contrary has not been suggested—as meaning "pecuniary advantage" and nothing else. The councillors here in question had a pecuniary interest in the sense that an existing liability in the case of some, and a possible future liablity in the case of others, was going to be maintained, and in that way their pockets were or might be affected. Speaking for myself, I think that that is enough, and it is immaterial, therefore, that the appellants voted in favour of preserving their liability. When I say that three councillors might have their pockets affected in the future, I am referring to the three who had not taken in lodgers or sublet at the time, but who each had a council house which was a potential income-producing asset. Their case is different from a councillor who merely had a hope of obtaining such a house in the future. I agree with the other members of the court that the appeals should be dismissed.

Appeals dismissed.

Solicitors: *Parker, Thomas & Co. for Max Engel & Co., Northampton; Director of Public Prosecutions.*

E. M. W.

REGINA v. CABORN-WATERFIELD.

C. C. A.

1956
June 5.

Lord Goddard C.J., Streatfeild and Donovan JJ.

Criminal Law—Court of Criminal Appeal—Reference by the Home Secretary—Consideration of court confined to ground of reference—No consideration of general matters of appeal—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 19 (*a*).

On a reference by the Secretary of State under section 19 (*a*) of the Criminal Appeal Act, 1907, the Court of Criminal Appeal will confine itself to a consideration of the ground or grounds on which the case has been referred and will not enlarge the ambit of the reference by considering any other matters.

Where, therefore, a prisoner, F., who had been convicted of shopbreaking and larceny, having made a representation to the Secretary of State that another prisoner convicted of the same offence was not there and was not concerned in the offence, the Secretary of State referred the case to the Court of Criminal Appeal under section 19 (*a*) of the Criminal Appeal Act, 1907, and at the hearing of the reference reliance could not be placed on the evidence of F. and he was not called, but it was sought to raise general matters of appeal:—

Held, that the court could not go into any matter other than the ground of the reference; and that, as no application was made to call the fresh evidence, the appeal constituted by the reference must be dismissed.

Reference by the Home Secretary under section 19 (*a*) of the Criminal Appeal Act, 1907.[1]

In March, 1954, the appellant, John Caborn-Waterfield, was indicted, with two other men, Arthur Anthony Rogers and John Timbrell Fricker, at Lewes Assizes, on a charge of shopbreaking and larceny, it being alleged that all three broke into a jeweller's shop in Eastbourne on the night of May 21/22, 1953, and stole jewellery worth about £800. Rogers pleaded guilty, and Fricker, who pleaded not guilty, was convicted and sentenced to four years' corrective training. In the case of the appellant, who pleaded not guilty, the jury disagreed.

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[1] Criminal Appeal Act, 1907, s. 19: "Nothing in this Act shall "affect the prerogative of mercy, but "the Secretary of State on the con"sideration of any petition for the "exercise of . . . mercy or of any "representation made by any other "person, having reference to the con"viction of a person on indictment "or to the sentence . . . passed on "a person so convicted, may, if he "thinks fit, at any time either— "(*a*) refer the whole case to the Court "of Criminal Appeal, and the case "shall then be heard and determined "by the Court of Criminal Appeal as "in the case of an appeal by a person "convicted; or, (*b*) if he desires the "assistance of the Court of Criminal "Appeal on any point arising in the "case . . . refer that point to the "Court of Criminal Appeal for their "opinion thereon . . ."

Criminal Appeal Rules, 1908 (S.R. & O., 1908, No. 227), r. 48: "When "the Secretary of State exercises his "powers under section 19 (*a*) of the "[Criminal Appeal] Act and refers "the whole case to the Court of "Appeal, the petitioner whose case is "so dealt with shall be deemed to be "for all the purposes of the Act or "these rules a person who has ob"tained from the Court of Appeal "leave to appeal, and the Court of "Appeal may proceed to deal with "his case accordingly."

The appellant was retried in May, 1954, at East Sussex quarter sessions, when he was convicted and sentenced to three years' imprisonment. At the trial the principal witness for the prosecution was one Anne Wood, who had originally denounced the three men to the police, and who said that on May 21, 1953, she had gone with Rogers, Fricker, the appellant and another girl, Patricia Darling, on a trip to Eastbourne in a car, and that in the evening the men had left her and Patricia Darling in the parked car and, after a long absence, had come back and said that they had done a robbery; she also said that when they returned to Patricia Darling's flat in London the men produced a quantity of jewellery. Both Rogers and Fricker had told the police from the start that the appellant had not been with them on the trip to Eastbourne. Patricia Darling originally made a statement implicating the appellant, but subsequently swore an affidavit to the effect that the appellant had not gone to Eastbourne with the others on May 21, 1953. Rogers gave evidence at the second trial and denied that either the appellant or Fricker had been concerned with him in the robbery. Fricker, whose application for leave to appeal was then outstanding, made it clear that he would not be a willing witness for the defence and was not called; nor, on the instructions of the appellant, was Patricia Darling. The appellant throughout denied that he had gone to Eastbourne on May 21, 1953, and said that at that date he had not known the others concerned.

The appellant applied for leave to appeal against his conviction on the grounds, inter alia, that at his trial the evidence of Fricker and Patricia Darling had been suppressed. On July 12, 1954, the Court of Criminal Appeal dismissed his application.

On December 23, 1955, Fricker, who had abandoned his application for leave to appeal, submitted a petition to the Secretary of State stating that the appellant was entirely innocent of the crime for which he had been convicted, and that he (Fricker) and Rogers were guilty and had committed it without assistance from anybody else. He stated that the reason for making the petition then and not immediately after his conviction was that it was not until very recently that he had realized that he could submit a petition for the sole purpose of giving information and that he had nothing to gain from presenting the petition, his sole purpose being that he felt in fairness to the appellant he should tell the truth.

Subsequently a police officer interviewed all the persons concerned. Fricker said that the appellant had not gone with them to Eastbourne and that he and the appellant had not known each other at the time of the trip; Rogers refused to make a statement but orally informed the police officer that the appellant had not been there; Patricia Darling confirmed her version that the appellant had not gone with them to Eastbourne, but Anne Wood repeated almost exactly the evidence which she had given at the trial. The appellant repeated what he had said before.

The Secretary of State referred the case to the Court of Criminal Appeal under section 19 (*a*) of the Criminal Appeal Act, 1907.

At the hearing of the reference it was not argued that weight could be placed upon the evidence of Fricker, and the application that he should be called was not pressed, nor, on the instructions of the appellant, was leave asked to call Patricia Darling, but it was sought to raise general matters of appeal and to argue that the conviction should not be allowed to stand on the grounds that, at the trial, there had been (a) misreception of evidence by the deputy chairman; (b) misdirection on the questions of corroboration; and (c) misdirection as to the law of evidence regarding the impeaching of the credit of Anne Wood.

Eric Myers, for the appellant, addressed the court on the facts and stressed the fact that both Rogers and Fricker had from the first singled out the appellant as not being at Eastbourne on the night of the robbery.

[LORD GODDARD C.J. We are not the jury. We have to see whether or not such further evidence as has come to light is of a convincing nature. The only further evidence which it is now suggested that the court should hear is that of Fricker to the effect that the appellant was not there. How could this court say on Fricker's evidence that the appellant ought not to have been convicted?]

In the circumstances it is not felt that an application for leave to call Fricker should be urged, nor, on the express instructions of the appellant, is any application made for leave to call Patricia Darling, but it is desired to rely on certain other matters relating to the trial which were not raised on the application for leave to appeal, when the appellant was not represented. Complaint is made of misreception by the deputy chairman of certain evidence, of misdirection on corroboration, and of misdirection as to the law in relation to evidence impeaching the credit of Anne Wood.

[LORD GODDARD C.J. The Secretary of State has referred the question of fresh evidence and the court cannot go into those other matters. The application for leave to appeal was dismissed and that is as binding as the dismissal of an appeal.]

It is submitted that the court can consider general matters of appeal. On a reference of the whole case by the Secretary of State under section 19 (*a*) of the Criminal Appeal Act, 1907, the court hears and determines the case "as in the case of an appeal "by the person convicted." By rule 48 of the Criminal Appeal Rules, 1908, "the petitioner," which expression must by reference include "the person convicted," is to be deemed a person who has obtained leave to appeal. The appellant, therefore, is in the position of a person who has obtained leave to appeal.

[LORD GODDARD C.J. But on what grounds? Leave to appeal is not given on general grounds.]

The reference cannot be substituted for a notice of appeal. The appellant is in a peculiar position. He cannot be bound by a notice of appeal because there is no notice of appeal, nor is he bound by the petition or representation because it is not his. He is before the court perforce and, the matter having come before the court by the reference, he has a status which is that of an appellant in every sense of the word. The Criminal Appeal Rules, 1908, have statutory force; they relate to penal matters and should therefore be construed in favour of the subject. There is no authority containing any clear direction confining the court's jurisdiction on a reference under section 19 (*a*) and the matter falls under the general rule stated by the court in *Rex* v. *McGrath.*[2]

The Secretary of State can refer a case under section 19 (*a*) or under section 19 (*b*). If there is one point, or specific points, to be considered, the appropriate procedure is under subsection (*b*). Where there is a reference of the whole case under subsection (*a*) the matter is at large, subject, perhaps, to the qualification that if the court has already ruled on a point on an application or an appeal that point cannot be raised again. [Reference was also made to *Rex* v. *Hullett.*[3]] The court has jurisdiction to consider a reference in all respects as if it were an appeal: see *Rex* v. *McGrath*,[4] *Rex* v. *Collins*[5] and *Reg.* v. *Sparkes*.[6]

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[2] [1949] 2 All E.R. 495.

[3] (1922) 17 Cr.App.R. 8.

[LORD GODDARD C.J. Those cases were concerned with the reception of fresh evidence.]

The jurisdiction is in aid of, or ancillary to, the exercise of the prerogative of mercy and the court is not bound by the usual limitations of an appeal.

Sir Reginald Manningham-Buller Q.C., A.-G., and *John Phipps* for the Crown. The court cannot go into general matters of appeal. The reference comes before the court on a particular ground, namely, that Fricker has said that the appellant was not concerned in the crime and that the appellant, therefore, must be innocent. That is the reference and the only matter which the court can consider. On a reference by the Secretary of State the court can quash a conviction or dismiss the appeal constituted by the reference, but it is not within the contemplation of the Act that on a reference under section 19 (*a*) it is open to a convicted person to raise any point which he would like argued. It is implicit in the Act that where a reference is made on a particular ground it is to be treated as leave to appeal on that ground alone.

Eric Myers in reply. Reliance is placed on the principle that on the hearing of a reference the court will not consider itself fettered as if there had been no reference: see *Reg.* v. *Sparkes*,[7] where Donovan J., reading the judgment of the court, said[8]: "Each case must, therefore, be decided upon its merits, although "the court will not treat itself as bound by the rule of practice "if there is reason to think that to do so might lead to injustice "or to an appearance of injustice." It is, therefore, a question of discretion for the court. If the court were to refuse to consider these grounds of appeal it is submitted that there would be an appearance of injustice.

LORD GODDARD C.J. This is a reference by the Secretary of State under section 19 (*a*) of the Criminal Appeal Act, 1907, with regard to the conviction of John Caborn-Waterfield, who was convicted at the East Sussex quarter sessions on May 6, 1954, of shopbreaking and larceny, and sentenced to three years' imprisonment.

The appellant was indicted along with two other men, Rogers and Fricker, who were both convicted. Rogers pleaded guilty;

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[4] [1949] 2 All E.R. 495.

[5] (1950) 34 Cr.App.R. 146.

[6] [1956] 1 W.L.R. 505; [1956] 2 All E.R. 245.

[7] [1956] 1 W.L.R. 505.

[8] Ibid. 514.

Fricker not guilty. The appellant pleaded not guilty and the jury disagreed. The case against him at his second trial depended entirely upon the evidence of a young woman named Anne Wood, who has said from the first—she has never been shaken on this point and her evidence has been consistent throughout—that Caborn-Waterfield was a member of the party which went down to Eastbourne on the day when the shopbreaking was effected. Rogers said at the trial that Fricker was not present. Fricker now admits that he was present, although he denied it on oath at his trial, and he has said that Caborn-Waterfield was not present, whereas Anne Wood has all along said that Caborn-Waterfield was one of the party. There was another young woman in the party called Patricia Darling; the first account which she gave to the police plainly implicated Caborn-Waterfield as a member of the party that went down on this day, but subsequently she withdrew that by making an affidavit in which she said that he was not. All those persons, therefore, said one thing at one time and another at another. It is only right to say that Caborn-Waterfield always denied that he was there, but the jury, having heard the case, convicted him. He has very nearly served his sentence—he is due to be released in about a fortnight's time—but meanwhile, for some reason as to which it is not necessary to speculate, Fricker has put forward a petition to the Secretary of State in which he has said that Caborn-Waterfield was not one of the party, and the Secretary of State has seen fit, in the circumstances, to refer the case to this court.

Mr. Eric Myers, who has argued the case with clarity and skill, realizes that he cannot ask this court to rely on Fricker's evidence or upon Patricia Darling's evidence, and he says that he has the express instructions of his client not to ask leave to call Patricia Darling, and he realizes that it would be no use to call Fricker. Therefore, nothing remains of this reference but for Mr. Myers to go behind the reference and say: "As this "matter has been referred, any point is open to me and I want "now to challenge the chairman's summing-up and to consider "the question whether certain evidence was properly admitted "in the court below." Caborn-Waterfield, having been convicted, applied to this court for leave to appeal and set out a variety of grounds, and the court had before it on the hearing of the application, as this court always does, the summing-up; if the court could have found any reason for thinking that the summing-up was in any way defective, leave to appeal would have been given. However, the court did not give leave to appeal, but dismissed his application, and there was an end of it.

It is quite impossible for this court to hold that, on a reference by the Secretary of State on the ground that further facts have been submitted to him which he thinks the court ought to consider in deciding whether the verdict was right, that is to say, whether the verdict on the facts was right, the court can increase the ambit of the reference by going again into the whole of the facts of the trial and can consider points of law, which the Secretary of State has not referred to the court at all. If there is any question or doubt about it, this court desires to say quite definitely that on a reference by the Secretary of State under section 19 (*a*) they go through the grounds on which the Home Secretary has referred the case and confine themselves to those grounds. The court cannot go into all sorts of different grounds, otherwise, as has been pointed out, there might be no end to it. Supposing the Secretary of State referred the whole of a case, which had never been before the Court of Criminal Appeal at all, either by means of an application or an appeal, because the possibility of some defect in law at the trial had been brought to his attention, and also some question of fact, the court could then, of course, go into the questions of law and fact and give their decision; and if, after giving their decision on those questions, the Secretary of State then had some further evidence put before him which he thought might have had a bearing on the verdict, he could then refer that evidence to the court to consider whether or not it was ground for quashing the conviction. In such a case, according to the argument which Mr. Myers has put to us, it would be open to the court or counsel to challenge once again the whole legal position at the trial, the summing-up and the reception of evidence which had already been put before the court. The court thinks that when a matter of this sort is referred by the Secretary of State and we see at once the ground on which the Secretary of State has referred the case to us, the court must confine itself to that ground. As we are not asked to hear any further evidence, it follows that the appeal, because the case is treated as an appeal, is dismissed.

Appeal dismissed.

Solicitors: *Cohen & Cohen; Director of Public Prosecutions.*

J. F. L.

1956
June 5, 6.

Lord Goddard C.J., Streatfeild and Donovan JJ.

POSTILL *v.* EAST RIDING COUNTY COUNCIL.

Town and Country Planning—Development—Discontinuance—Permission to use field as site for circus—Conditional on use ceasing on September 7, 1952—*User in* 1952 *ceasing on September* 7—*Similar use in subsequent years—Whether use subsequent to* 1952 *breach of condition—Whether use discontinued on September* 7, 1952—*Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 12 (5) (*b*), 13 (1), 23 (1) (4)—*Town and Country Planning General Development Order,* 1950 (*S.I.* 1950, *No.* 728), *art.* 3 (1), *Sch. I, class* 4 (2).

In 1947, 1948 and 1949 a field was let to a travelling circus for about 11 days in each summer. In 1950 and 1951 it was similarly let for periods of about two months. In 1952 the owner of the field applied to the local planning authority for planning permission to use the field as a site for a circus and permission, dated May 26, 1952, was given for such use for the period July 20 to September 7, 1952, subject to the condition that the use thereby authorized should be discontinued at the expiration of the period ending September 7, 1952. Performances of the circus terminated on September 6, 1952, and the circus left the land during the second week in September. In 1953, 1954 and 1955 the field was again used as a site for a circus for about two months in each year, and in 1955, during the period in that year when the field was occupied by a circus, the planning authority served on the owner an enforcement notice under section 23 of the Town and Country Planning Act, 1947, stating that a condition subject to which the planning permission dated May 26, 1952, was given had not been complied with, the breach of condition alleged being "Not discontinuing the use of the said land as a site for a circus from and after September 7, 1952," and requiring that all tents, caravans or structures and all equipment and materials brought onto the land in connexion with the circus be removed and that "the use of the . . . land as a site for a circus shall be discontinued":—

Held, that the condition under which the planning permission dated May 26, 1952, was given was that the use in 1952 should cease on September 7, 1952, and that that condition was complied with when the use of the land for a circus was discontinued on September 7, 1952. There was a distinction between a continuous user and a discontinuance followed by a resumption or repetition of user for the same purpose after a substantial interval of time, and the resumption of user in 1953 after 10 months' interval (and in subsequent years) was not a continuance of the same user as in 1952. There was, therefore, no breach of the condition imposed on the planning permission and the planning authority had no power to serve the enforcement notice.

CASE STATED by East Riding justices sitting at Bridlington.

On September 17, 1955, the appellant, Robert Postill, preferred a complaint against the East Riding County Council under section 23 (4) of the Town and Country Planning Act, 1947,[1] seeking, as a person aggrieved by an enforcement notice served upon him by the council, to have the notice quashed.

The following facts were found by the justices: In 1945 the appellant acquired certain land, a field at Fortyfoot, Bridlington, of which he was thereafter and at all material times the owner. Since 1945 the land was used in connexion with a riding school and for grazing, and use was also made of it for the accommodation of circuses giving performances in the summer as follows:

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[1] Town and Country Planning Act, 1947, s. 12 (5): ". . . permission shall not be required under "this Part of this Act—. . . (*b*) in the "case of land which, on the appointed "day, is normally used for one purpose and is also used on occasions, "whether at regular intervals or not, "for any other purpose, in respect of "the use of the land for that other "purpose on similar occasions after "the appointed day; . . ."

S. 13 (1): "The Minister shall by "order provide for the grant of permission for the development of land "under this Part of this Act, and "such permission may be granted— "(*a*) in the case of any development "specified in any such order, or in "the case of development of any class "so specified, by that order itself; ". . ."

S. 23: "(1) If it appears to the "local planning authority that any "development of land has been "carried out after the appointed day "without the grant of permission "required in that behalf under this "Part of this Act, or that any conditions subject to which such permission was granted in respect of any "development have not been complied "with . . . the local planning authority may within four years of such "development being carried out, . . . "serve on the owner and occupier of "the land a notice under this section. ". . . (4) If any person on whom an "enforcement notice is served under "this section is aggrieved by the "notice, he may, . . . appeal against "the notice to a court of summary "jurisdiction . . . and on any such "appeal the court—(*a*) if satisfied that "permission was granted under this "Part of this Act for the development "to which the notice relates, "or that no such permission was "required . . . or, as the case may "be, that the conditions subject to "which such permission was granted "have been complied with, shall "quash the notice to which the "appeal relates; . . ."

Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950 (S.I. 1950, No. 728), art. 3: "(1) . . . development "of any class specified in the First "Schedule to this Order is permitted "by this Order and may be undertaken . . . without the permission "of the local planning authority or "the Minister . . . (2) Nothing in "this article or in the First "Schedule to this Order shall operate "so as to permit any development "contrary to a condition imposed in "any permission granted or deemed "to be granted under Part III of the "Act otherwise than by this Order."

Sch. I: "The following development is permitted under Article 3 "of this Order . . . Class IV, 2. The "use of land . . . for any purpose "on not more than 28 days in total "in any calendar year, and the erection or placing of movable structures on the land for the purposes "of that use."

1947	Some days (Patrick's).
1948	Eleven days (June 9–11, Ringland's; July 12–14, Paulo's; August 23–27, Barrett's).
1949	Ten days (Barrett's).
1950	Seven to eight weeks (Rosaire's Circus and Winship's).
1951	Over two months (Kaye Bros.).
1952	About two months (Rosaire's Circus).
1953	About two months (Rosaire's Circus).
1954	About two months (Rosaire's Circus).
1955	Over two months (Rosaire's Circus).

Each of the circuses was a complete circus bringing its own tents and equipment. In 1952, in consequence of representations made to the appellant by the Bridlington Corporation acting on behalf of the local planning authority, the appellant applied for, and obtained, planning permission dated May 26, 1952, for the use of the land as a temporary site for a travelling circus for the period from July 20 until September 7, 1952, the permission being made subject to a condition that the use thereby authorized should be discontinued, and any works necessary to reinstate the land should be carried out, at the expiration of the period ending September 7, 1952. Rosaire's Circus left the land during the second week in September, 1952, performances having terminated on September 6, 1952. On September 7, 1955, during the period in that year when the land was occupied by a circus, the council, as local planning authority, served on the appellant and Rosaire's Circus an enforcement notice stating that a condition subject to which the planning permission dated May 26, 1952, for the use of the land as a temporary site for a travelling circus from July 20, 1952, until September 7, 1952, was given had not been complied with, and that "The matter in respect of which the "above condition has not been complied with is: Not discon-"tinuing the use of the said land as a site for a circus from and "after September 7, 1952," and requiring the following steps to be taken within seven days from the date on which the notice took effect: "1. All tents, caravans, erections, or structures and "all equipment and materials brought onto the said land in con-"nexion with the said circus shall be removed. 2. The use of "the said land as a site for a circus shall be discontinued."

On behalf of the appellant it was contended, inter alia, that (a) the condition referred to in the enforcement notice was complied with in 1952 when the use of the land as a site for a circus ceased in September, 1952: (b) that section 12 (5) (*b*) of the Town and Country Planning Act, 1947, applied exactly to the case, for the land had been used as a site for a circus on occasions before the appointed day under the Act [July 1, 1948], and the appellant was entitled to use it on similar occasions after the appointed day; it did not matter that the occasions had only extended over two years, there being no qualifying period before a right could be claimed under section 12 (5) (*b*); in addition to that right the appellant was permitted by article 3 and class IV (2) of the First Schedule to the Town and Country Planning General Development Order, 1950, to use the land for 28 days in any one year; the application for planning permission was a surplusage, made under pressure from the Bridlington Corporation as agents for the planning authority, and planning permission was not necessary; the condition imposed on the permission was therefore invalid and there was no foundation for the enforcement notice: (c) section 23 (4) of the Act enabled a person aggrieved by the service of an enforcement notice to seek to have the notice quashed by the magistrates' court on three grounds, and if the ground as set out in contention (a) above failed, then planning permission had been granted by the Town and Country Planning General Development Orders, 1948 and 1950, as to the first 28 days' use in each year and no planning permission was necessary by section 12 (5) (*b*) of the Act as to the period in excess of 28 days in each year, and, accordingly, the enforcement notice should be quashed on those grounds.

On behalf of the council it was contended that (a) so far as the use of the land for circuses was concerned, this use had been continued in each year following the permitted period in 1952, and it could not, therefore, be said that the use had been discontinued in 1952: (b) the enforcement notice was not concerned solely with such use as might have been made of the land after the expiration of the permitted period in 1952, but it was also concerned with, and applied to, every continuation of the use of the land for circuses in 1953, 1954 and 1955: (c) the use of the land in each of the years 1947 and 1948 was insufficient to establish a right under section 12 (5) (*b*) of the Act, nor was such a use "on occasions" within the meaning of those provisions: (d) alternatively, any right established under section 12 (5) (*b*) would be confined to the use of the land on similar occasions amounting at most to a few days each, and after July 1, 1948, the permission granted by article 3 and the First Schedule, class IV, to the Town and Country Planning (General Development) Order, 1948 [S.I. 1948, No. 958], and the similar provisions in subsequent General Development Orders, which permitted any land unoccupied by buildings to be used for any purpose on not more than 28 days in any calendar year, could not be used to extend any rights which might be derived from section 12 (5) (*b*): (e) having regard to the permission granted by the General Development Orders the use which had been made of the land for circuses in 1948 and 1949 was use under a planning permission; it was not until 1950, when the land was used for circuses for more than 28 days in the year, that any use exceeded what was so permitted, and permission was still required for any use in excess of 28 days in 1952, when the appellant properly applied for, and obtained, planning permission: (f) the only ground upon which the justices could consider quashing the enforcement notice was that the condition, subject to which planning permission had been granted in 1952, had in fact been complied with, and any contention or evidence concerning other matters was irrelevant, as was shown by the provisions of section 23 (1) (2) and (4) of the Act, which clearly distinguished between enforcement notices relating to development carried out without permission and enforcement notices relating to breach of condition attached to a planning permission, and between the grounds upon which the justices might consider quashing either type of notice: (g) as it was admitted that the use of the land for circuses had continued in 1953 and subsequent years, there was no ground upon which the enforcement notice could be quashed.

The justices were of the opinion that under section 23 (4) of the Act an appeal against an enforcement notice could only succeed if the court were satisfied either that permission had been granted or that no permission was required; with regard to the first ground they were satisfied that no permission, other than the temporary permission which expired in 1952, had been granted, and with regard to the second ground they were of the opinion that planning permission was required for the use of the land as a site for a circus if so used for more than 28 days in any one year, and, accordingly, they dismissed the appeal.

The appellant appealed.

J. P. Widgery for the appellant. Section 23 of the Town and Country Planning Act, 1947, relates to two separate and different matters: first, development which has taken place without permission, and secondly, development for which planning permission has been given but where there has been a breach of some condition attached to the permission. On an appeal under section 23 (4), therefore, the duty of the justices is confined to considering, in the first case, whether development has taken place, or, in the second case, whether the condition has been complied with. The enforcement notice in the present case alleged breach of the condition to discontinue and reinstate at the end of the authorized period attached to the planning permission of May 26, 1952, and required compliance with that condition, and, therefore, the only question which the justices had to consider was whether or not the condition had been complied with. In fact, according to the findings of the justices, the condition was complied with in 1952, and the appellant then did exactly what it required; performances of the circus stopped on September 6, 1952, and the reinstatement was carried out within a reasonable time afterwards. If the council objected to the use of the field as a site for a circus in subsequent years their proper course was to serve a notice complaining of new development without permission, not to serve one that alleged a failure to comply with a condition of old permission.

In addition to the rights given by section 12 (5) of the Act, permission was given by the Minister under the Town and Country Planning General Development Order, 1950, art. 3 and Sch. I, class IV (2), for the use of land for any purpose on not more than 28 days in any calendar year. If, therefore, the use of the field for a circus in each year was a new development in each year, the council could not complain of such use until the "quota" of 28 days had been used up; if that were not so, it would mean that, for the privilege of being allowed to use the field as a circus site for seven weeks in 1952, the appellant has lost all his rights to the 28 days given by the Minister. Had he not applied for permission in 1952, it could not have been argued that the appellant had no right to use the field as a circus site for 28 days in any one year. If he used the field for more than the 28 days in any one year it would be open to the council to serve an enforcement notice complaining of new development without permission.

[Lord Goddard C.J. Then he would have another 28 days before that took effect.]

That appears to be a defect in the Act.

[Lord Goddard C.J. What effect on the 28 days has the permission?]

Under article 3 (2) of the General Development Order a specific condition attached to a planning permission overrides the authority given by the Order, but the condition in this case, on its true construction, was not intended to place a permanent restriction on the use of the land as a circus site. Had the appellant asked the council at the end of September, 1952, for an assurance that he had complied with the condition, and been refused, he would have been in a position to have issued a writ for a declaration. Once a condition to discontinue has been complied with, it has been complied with, and it cannot be said in a following year that it has not been complied with.

The justices dealt with the case as if the enforcement notice were one alleging new development without permission; they asked themselves whether permission was required, and never applied their minds to, or expressed an opinion on, the only question which they should have considered, namely, was the condition complied with? On the face of their opinion, therefore, they misled themselves. Had they asked themselves the right question, the only answer to which they could have come was that the appellant had discontinued the use and reinstated as required by the condition, and they should, therefore, have quashed the enforcement notice.

Harold Williams Q.C. and *Bazil Wingate-Saul* for the council. Permission is required for every use not exempted from permission by section 12 (5), that is, for every use except for, in this case, a few days, and is given either by the planning authority or by the Minister by the General Development Order of 1950. Assuming that the periods during which the field was used as a circus site before the appointed day were " occasions " within the meaning of section 12 (5), on no possible interpretation could the periods of seven or eight weeks' use in subsequent years be " similar " occasions " within the section. Neither section 12 (5) nor the permission for 28 days' use given by the Minister by the General Development Order justify the periods of seven or eight weeks' use of the field as a circus site in 1950 and 1951, and permission was required for that use. Permission was given in 1952, but subject to the condition that the use of the land in that way be discontinued on September 7, 1952.

[Lord Goddard C.J. Does " discontinued " in the permission mean discontinue for ever?]

It is submitted that it does; it is impossible to attach any meaning to the word " discontinued " which would permit of a revival of the use. It is conceded that the condition does not apply to the " similar occasions " for which by section 12 (5) permission is not required, but as regards the 28 days' period under the General Development Order, 1950, by article 3 (2) of the Order the permission thereby given by the Minister shall not "operate so as to permit any development contrary to a condition imposed in any permission granted," and the condition, therefore, overrides the permission given in the Order. If that argument is wrong, and the appellant is entitled to use the field as a circus site for 28 days under the Order, it would mean that the council could do nothing to prevent such use for 28 days; if the use continued beyond that period the council could on the 29th day serve an enforcement notice, but by section 23 (3) the notice could not take effect for a further 28 days, so that the appellant would be able to use his field for two months without planning permission. The matter would not end there, for on the 27th day after the service of the notice he could apply for permission and by proviso (*a*) to section 23 (3) the notice would be of no effect pending the final determination of the application. If permission was refused the appellant could then appeal to the Minister and the appeal might well take several months. In the result, therefore, he would be able to use his land for the greater part of a year in defiance of the planning authority.

There is nothing in the Act to confine a condition to any one year; the exemption for "similar occasions" in section 12 (5) is not related to a year. "Year" is only applicable to the Minister's permission given in the General Development Order, which does not assist the appellant because it is contrary to the condition.

The nature of planning permission is defined in section 18 (4); prima facie, permission "shall enure" and continues for all time, subject to the fact that it can be given for a "limited period" (see section 18 (5)) only and can subsequently be revoked or modified. The permission given to the appellant in 1952 was for a limited period, and in addition to the permission being limited to the period ending September 7, 1952, the condition was imposed that the use be discontinued on that date; had it been intended merely to bring the use in 1952 to an end on September 7, the addition of the condition would have been unnecessary; it must, therefore, have been intended that the use should not be resumed thereafter.

Assuming that there was a right to use the field for a few days under section 12 (5), that is not a ground for quashing the notice, for it merely exceeded what was necessary to ensure compliance with the condition, and the justices should have varied the notice under section 23 (4) (*b*).

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Lord Goddard C.J. This is a case stated by justices for the East Riding, before whom a complaint was preferred by the appellant, seeking as a person aggrieved by an enforcement notice served under the provisions of the Town and Country Planning Act, 1947, to have the notice quashed, and I think that the point for our determination is really a very short one.

The appellant is the owner of a field which, for a considerable number of years past, he had been in the habit of letting to travelling circuses for an average of about 11 days each year during the summer. No doubt the use of the field as a caravan site or a circus site would amount to development under the Town and Country Planning Act, 1947, but the Act provides by section 12 (5) (*b*) that permission is not required in the case of land which on the appointed day (July 1, 1948) "is normally "used for one purpose and is also used on occasions, whether at "regular intervals or not, for any other purpose, in respect of the "use of the land for that other purpose on similar occasions after "the appointed day." Permission, therefore, was not required for the use of the land for a circus site for 11 days in any year. In addition to that the Minister, by the Town and Country Planning General Development Order, 1950 (article 3 and Schedule 1, class IV (2)), granted permission for use of land for any particular purpose for a period not exceeding 28 days; the court, however, does not find it necessary to decide in this particular case whether or not, by reason of that provision in the General Development Order, the appellant would have been entitled to use the field as a circus site for 11 days plus 28 days in any one year.

In 1952 the appellant applied for and obtained planning permission to use the land from July 20, 1952, until September 7, 1952, for the purpose of a circus being held there, and that period, of course, would be longer than either the 11 days to which it is conceded he had a right without any permission, or the 11 days plus 28 days. The permission was subject to a condition that the use thereby authorized should be discontinued on September 7, 1952. In fact, the appellant discontinued the use of the field for a circus on September 6, 1952, and the circus left the land. The next year, 1953, the appellant did not apply for any permission, nor did he in 1954, and in 1955 the circus was also there, but on September 7, 1955, an enforcement notice was served upon him because it was said that there had been a breach of the condition imposed on the permission granted in 1952, and the matter in respect of which it was said that the condition had not been complied with was not discontinuing the use of the land as a site for a circus from and after September 7, 1952.

[His Lordship read section 23 (4) of the Town and Country Planning Act, 1947, and continued:] The justices have held that although in September, 1952, the appellant did discontinue the use in the sense that the field ceased on that date to be used as the site of a circus, as in the next year and in 1954 the land was again used for the circus, the condition under which permission had been given in 1952 had been broken. This court cannot take that view. We think that the condition under which planning permission was given was that the use in 1952 should cease on September 7, 1952, and that it did cease on that day. When the next year, 1953, came, it is agreed that he could have used his field for the circus at any rate for 11 days. It is also contended that he could have used it for 11 days plus 28 days under the General Development Order, 1950, but, as I said before, this court does not think that it is necessary to decide in this case—we do not want to decide more than is necessary—whether or not he could have used it for the 28 days in addition to the 11 days, but at any rate he could have used it for 11 days. It is said that he had broken the condition in 1952 because in 1953 he allowed the circus to come back again, as he certainly was entitled to do for some period. We think in this case that as the justices found that the circus did cease on September 7, 1952, there was no breach of the condition, and therefore that the justices ought to have quashed the order. The only point in this case, it seems to me, is whether or not there was a discontinuance in 1952, and as there was a discontinuance, the authority had no power to serve an enforcement notice, and this appeal, therefore, must be allowed.

Streatfeild J. I am of the same opinion. I think that the case narrows down to the one question whether the condition of discontinuance on September 7, 1952, had been fulfilled. In fact the circus was discontinued and the user of the land for that purpose was discontinued on September 7, 1952. I think that a distinction must be drawn between continuance of user and a repeated user for the same purpose after a substantial interval of time, and I am unable to take the view that a resumption or repetition of the same user starting some 10 months later in 1953 was in fact a continuance of the same user as in 1952, and so on in 1954 and 1955.

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For these reasons, I agree that the facts show that the condition in the 1952 permission was in fact fulfilled and, that being so, it is laid down in section 23 (4) (*a*) that, the condition being fulfilled, the justices should have quashed the enforcement notice. Therefore, I agree that this appeal should be allowed.

DONOVAN J. I agree, and I add only this, that the word "discontinued" does not necessarily mean permanently discontinued. One discontinues many things that may be only discontinued for a time, and when one resumes what one has discontinued it does not mean that there has never been any discontinuance. There has been a discontinuance followed by a revival or resumption. For those reasons I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Collyer-Bristow & Co. for Harland, Woodhouse & Turnbull, Bridlington; Sharpe, Pritchard & Co. for R. A. Whitley, Beverley.*

J. F. L.

1956
June 6.

Lord Goddard C.J., Streatfeild and Donovan JJ.

MASSEY-HARRIS-FERGUSON (MANUFACTURING) LTD. *v.* PIPER.

Factory — Persons benefited by regulations — "Persons employed" — Person employed by independent contractor electrocuted in factory premises—Liability of factory occupier for breach of regulations—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 60 (*as amended by Factories Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 55), *s.* 12)—*Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy in Premises under the Factory and Workshop Acts,* 1901 *and* 1907 (*S.R. & O.,* 1908, *No.* 1312), *reg.* 1.
Factory—Electricity—Switch.

The Factories Act, 1937, s. 60, as amended by the Factories Act, 1948, s. 12, gives the Minister power to make regulations where he is satisfied that the nature of the work or plant in factories is "of such a nature as to cause risk of bodily injury "to the persons employed . . ."

While carrying out painting work in a factory, L., a painter employed by a firm of independent contractors, came into contact with some exposed trolley wires, which supplied electrical power to an overhead travelling crane, and was electrocuted. On an information preferred against the appellants, the occupiers of the factory, charging them with a contravention of the electricity regulations made under section 60 of the Act of 1937:—

Held, that the words "persons employed" in section 60 included not only the servants of the occupier of the factory, but any other person who might be called on to do work in the factory; accordingly, the appellants were liable for a breach of the regulations in respect of L.'s death.

Smith v. *Cammell Laird & Co.* [1940] A.C. 242; 56 T.L.R. 164; [1939] 4 All E.R. 381 and *Mulready* v. *J. H. & W. Bell Ltd.* [1953] 2 Q.B. 117; [1953] 2 All E.R. 215 applied.

Hartley v. *Mayoh & Co.* [1954] 1 Q.B. 383; [1954] 1 All E.R. 375 and *Stanton Ironworks Co. Ltd.* v. *Skipper* [1956] 1 Q.B. 255; [1955] 3 All E.R. 544 distinguished.

CASE STATED by Manchester justices sitting at Strangeways.

On November 21, 1955, an information was preferred by the respondent, an inspector of factories, against the appellants that on September 6, 1955, at Ashburton Road, Trafford Park, Lancaster, the appellants were the occupiers of a factory within the meaning of the Factories Act, 1937, which was subject to the Electricity (Factories Act) Special Regulations, 1908 and 1944, made under section 60 of the Act of 1937, and that on that date there was a contravention of regulation 1 of the principal regulations in that certain apparatus, namely, the switch controlling electricity supply to the overhead travelling crane in No. 3 bay of the factory was not so worked as to prevent danger so far as was reasonably practicable, and that in consequence George Lyth, who was working in the factory, suffered bodily injury, whereby the occupier was, without prejudice to any other penalty, liable to a fine not exceeding £100 in accordance with section 133 of the Act of 1937.

On December 9, 1955, the justices heard the information and found the following facts:

The appellants were the occupiers of the factory which was subject to the regulations. In No. 3 bay there were some exposed trolley wires which supplied electrical power to an overhead travelling crane. The wires ran along a crane track girder close to the wall of the bay some 21 or 23 feet above the floor, and were so constructed, installed, protected, worked and maintained as to prevent danger save as hereinafter appears. On September 6, 1955, painting of the wall and the cranework was in progress. The painting work was being carried out by a firm of painters and decorators called T. E. Edwards & Co., who were independent contractors, and the men employed on the work were not servants of the appellants. To facilitate the work the servants of T. E. Edwards & Co. had erected for their use a scaffold consisting of a plank supported by two ladders leaning against the wall of the bay at its south end. Lyth was one of the painters employed on the work and was required in the course of his employment to work on the plank. He and other servants of Edwards & Co. had been instructed by the proprietor of Edwards & Co. to make sure that the electric power was switched off before going up the ladders. Martin Joseph Roddy was a crane driver in the employment of the appellants. At about 8 p.m. when he was on the floor of the factory, one of the painters asked him whether the power was off on No. 3 crane. Roddy then went to a switch at the south end of the building and switched it from the "On" to the "Off" position, under the impression that he had thereby switched off the power from the trolley wires of the crane in No. 3 bay. He then informed the painters that the power on No. 3 crane was switched off. Later in the evening Lyth climbed one of the ladders to the plank, came in contact with the trolley wires, was electrocuted and died of his injuries. The switch operated by Roddy had at one time controlled the supply of electric power to the trolley wires in No. 3 bay, but that switch had since been disconnected without Roddy's knowledge. There was no indication on or near the switch that it no longer controlled the supply of electric power. At the time of the accident the switch controlling the supply of electric power to the trolley wires in No. 3 bay was situated in an electric sub-station at the north end of the bay, some 215 feet from the scene of the accident. The location of the switch was not known to Roddy. At the time of the accident that switch was in the "On" position. The door of the sub-station was locked, the key being in the possession of the appellants' security officer. Maintenance work on the trolley wires was done by outside contractors. The appellants' servants were not called on to approach the wires and were not in any way endangered by them. The switch in the sub-station was in good order, mechanically and electrically.

It was contended by the appellants, inter alia, that the proper construction of the word "danger" in regulation 1 of the principal regulations was danger to persons employed by the occupier and there was no evidence of danger within the meaning of regulation 1. The justices were of opinion that the failure to turn off the switch at the proper time constituted a failure to work it so as to prevent danger within the meaning of regulation 1, and that in consequence of this failure the deceased suffered injury; that the deceased, although not a servant of the occupiers, was at the time of the accident a "person employed" by them within the meaning of the regulations, and found the appellants guilty of a breach of regulation 1 and imposed a fine of £50.

Douglas Naylor for the appellants. The prosecution not having proved that there was a danger to persons employed by the occupier of the factory, the appellants are not guilty of any offence against the regulations. As in *Hartley* v. *Mayoh & Co.*,[1] where it was held that a fireman summoned to a fire in a factory did not belong to the class of "persons employed" for whose benefit the regulations were made, so here the deceased did not belong to that class. In *Stanton Ironworks Co. Ltd.* v. *Skipper*[2] Lord Goddard C.J. said[3] that no doubt the regulation there in question was passed for the benefit of the servants of the occupier of the factory and he assumed that the occupier did not owe a duty towards a person who was not employed by them. Ormerod J. in the same case said[4] that he thought that it was clear that the only persons in contemplation in the regulation were those persons actually employed by the occupier of the factory.

[LORD GODDARD C.J. Section 133 of the Factories Act, 1937, provides that if any person is killed the occupier shall be liable to a penalty. Here a person was killed. Why is the occupier not liable?]

It is first necessary to establish a breach of the regulations, and to do that the justices must find that there is danger to persons employed by the occupier. Regulation 1 and the definition read together provide that all apparatus shall be so installed as to prevent danger to persons employed. Persons employed must be read as persons employed by the occupier.

[DONOVAN J. The painters were employed by somebody. Where do you get this limitation?]

From *Stanton's* case.[5]

[LORD GODDARD C.J. How can you say that a switch that will not switch off is properly constructed? The present case appears to be indistinguishable from *Stanton's* case.[5]]

In *Stanton's* case[5] the justices found that the system of pushing wagons was a danger to persons employed by the occupier of the factory. If the justices in the present case had found that the appellants' servants were endangered by the wires the case would have been unarguable.

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[1] [1954] 1 Q.B. 383; [1954] 1 All E.R. 375.

[2] [1956] 1 Q.B. 255; [1955] 3 All E.R. 544.

[3] [1956] 1 Q.B. 255, 259.

[4] Ibid. 260.

[5] [1956] 1 Q.B. 255.

[LORD GODDARD C.J. This was a most dangerous trap, and I do not think that the justices were justified in finding that there was no danger to the appellants' servants.]

S. B. R. Cooke for the respondent. That the expression "persons employed" includes persons employed by an independent contractor is made clear from *Smith* v. *Cammell Laird & Co.*,[6] in which the employee of an independent contractor was injured in a shipbuilder's yard and it was held that the shipbuilder, as the occupier for the purpose of the regulations and responsible for their breach, was liable. In *Mulready* v. *J. H. & W. Bell Ltd.*[7] the Court of Appeal held that contractors were liable under the Building Regulations, 1948, for injury to a workman employed by a sub-contractor on the ground that the contractors, having agreed with the building owner to do the work, it made no difference whether they chose to perform the work by their own workmen or by means of a sub-contract. The observations of the Court of Appeal in *Hartley* v. *Mayoh & Co.*[8] were not strictly necessary to the decision, because they upheld the trial judge, who decided the case on common law liability. It is clear from section 64 (3) of the Factories Act, 1937, that "persons "employed" include persons employed by persons other than the occupier of the factory.

LORD GODDARD C.J. stated the facts and continued: No one disputes here, so far as I know, that this electrical installation was not in the condition in which it ought to have been under the regulations, except in one respect. It is said that the electricity regulations are only made for the benefit of the servants of the occupier of the factory, and that there was no danger to the servants of the occupier because he always employed outside contractors to do maintenance or other work.

Under section 60 of the Factories Act, 1937, it is provided: "Where the Minister is satisfied that any manufacture, "machinery, plant, equipment, appliance, process or description "of manual labour used in factories is of such a nature as to "cause risk of bodily injury to the persons employed, or any class "of those persons he may, subject to the provisions of this Act,

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[6] [1940] A.C. 242; 56 T.L.R. 164; [1939] 4 All E.R. 381.

[7] [1953] 2 Q.B. 117; [1953] 2 All E.R. 215.

[8] [1954] 1 Q.B. 383.

"make such special regulations as appear to him to be reasonably "practicable and to meet the necessity of the case." The Minister made regulations known as the Regulations for the Generation, etc., of Electrical Energy in Premises under the Factory and Workshop Acts, 1901 and 1907, regulation 1 of which provides: "All apparatus and conductors shall be "sufficient in size and power for the work they are called upon "to do, and so constructed, installed, protected, worked and "maintained as to prevent danger, so far as is reasonably prac-"ticable." "Danger" is defined as "danger to health or danger "to life or limb from shock, burn, or other injury to persons "employed, or from fire attendant upon the generation, trans-"formation, distribution, or use of electrical energy."

Section 133 of the Act of 1937 provides: "If any person is "killed, or dies, or suffers any bodily injury, in consequence of "the occupier or owner of a factory having contravened any "provision of this Act or of any regulation or order made there-"under, the occupier or owner of the factory shall, without "prejudice to any other penalty, be liable to a fine not exceeding "£100."

Mr. Naylor, who has argued this point with great care, does not suggest that he can support some of the contentions, but the point he has taken is that, as this man who was killed was not employed by the appellants, none of these regulations apply to him and, therefore, no offence has been committed. He relied especially for that contention on a decision of the Court of Appeal in *Hartley* v. *Mayoh & Co.*,[1] in which it was held that a fireman employed by the local authority which maintained the fire brigade, who was called in in an emergency to a fire at a factory, was not one of the "persons employed" within section 60 of the Act of 1937. One can understand that; he was a man who always has to be exposed to special dangers, and he was called in to deal with a particular emergency. He was not employed in the factory. He had gone there to quell a fire. He was no more employed in the factory than a police constable, who might be called in to quell a disturbance at the factory or arrest a thief found in the factory. He is not a person employed. It seems to me that one cannot use that decision to say that these regulations apply only to the servants of the factory occupier. The test is whether a person is employed in the factory, not whether he is employed by the occupier. It is true that

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[1] [1954] 1 Q.B. 383; [1954] 1 All E.R. 375.

Ormerod J., in *Stanton Ironworks Co. Ltd.* v. *Skipper*,[2] thought that since the decision in *Hartley* v. *Mayoh & Co.*[3] it must be taken that these regulations only apply to persons employed by the occupier of the factory. I only said in giving judgment that I assumed for the purposes of my judgment that that was so because I did not think the matter really arose. That was a case in which a locomotive was used in a factory, in breach of the conditions laid down for the use of locomotives in factories. Of course, a locomotive is an obvious danger to employees. The man who was killed was not an employee. I said that there was a danger to the employees, and therefore there was a breach of the regulations and, as a death had resulted, there was liability. But the two cases to which Mr. Cooke has called our attention of *Smith* v. *Cammell Laird & Co.*[4] in the House of Lords, and *Mulready* v. *J. H. & W. Bell Ltd.*,[5] in the Court of Appeal, both in my opinion show quite clearly that the words "persons employed" in these cases are not limited to persons who are employed by the factory occupier or owner, but include men doing work in the factory by whoever they are employed. I was a party to the decision in *Mulready's* case,[5] and I hope I made it clear in that judgment that that was the position.

It is not without interest to note that section 60 of the Factories Act, 1937, was amended by the Act of 1948, so that the words were made to read "is of such a nature as to cause risk "of bodily injury to the persons employed," perfectly general words, though in the Act of 1937 those words were qualified to this extent, that the section before the amendment read "cause "risk of bodily injury to persons employed in connexion there-"with." This amendment made in 1948 was obviously intended to widen the scope. I think there is no question about it that these regulations now are intended to protect, not only the servants of the factory occupier, but any other persons who may be called upon to do work in the factory, such as sub-contractors. Those are the type of people who particularly need protection. They are not accustomed to the work of the factory, they do not know anything about the working of these electric cranes or the details of the electric installation in the factory. Therefore, it is all the more important if outside contractors are employed—

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[2] [1956] 1 Q.B. 255, 260; [1955] 3 All E.R. 544.

[3] [1954] 1 Q.B. 383.

[4] [1940] A.C. 242; 56 T.L.R. 164; [1939] 4 All E.R. 381.

[5] [1953] 2 Q.B. 117; [1953] 2 All E.R. 215.

and the appellants appear to do all their maintenance work by means of outside contractors—that they should be protected.

In my opinion, the justices came to a perfectly proper decision in point of law. I do not think that the decision in *Hartley* v. *Mayoh & Co.*[6] can have anything like so wide an effect as has been contended for, and as it seems Ormerod J. thought it had. It has been pointed out that no authorities were cited in that case, and at any rate the decision was as I have stated and does not bind this court to decide the case on the ground that only the employees of the occupier of the factory are protected by these regulations. For those reasons, in my opinion, this appeal fails and must be dismissed.

STREATFEILD J. I am of the same opinion. Section 60 of the Factories Act, 1937, gives the Minister power to make special safety regulations where he is of opinion that the plant in any factory is of such a nature as to cause risk of bodily injury to persons employed or any class of those persons. In pursuance of a similar power under the Factory and Workshop Acts, 1901 to 1907, the Minister made the electricity regulations of 1908, the first of which lays down that all apparatus and conductors shall be so worked and maintained as to prevent danger so far as is reasonably practicable. "Danger" in this sense is defined as meaning danger to life or limb or bodily injury to persons employed. The case really boils down to only one question, that is, whether the regulations apply to a person employed by an independent contractor. I have come to the conclusion that they clearly apply to any person who is employed in the factory whether the direct servant of the occupier or a servant of an independent contractor so long as he is employed upon work in that factory, as the dead man was here. In *Hartley* v. *Mayoh & Co.*[7] I do not think the Court of Appeal decided that a regulation such as this applies only to employees of the occupier. They did no more in that case than to decide that the regulation in question did not apply to a fireman who was not a person employed; nor do I think in *Stanton Ironworks Co. Ltd.* v. *Skipper*[8] that this court decided the particular question which is now raised. That case was decided on quite a different issue. I think *Smith* v. *Cammell Laird & Co.*[9] in the House of Lords is an ample illustration and authority that a regulation worded like this one applies, not only to the persons employed by the occupier, but to persons working there although employed by an independent contractor.

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[6] [1954] 1 Q.B. 383.

[7] Ibid.

[8] [1956] 1 Q.B. 255.

[9] [1940] A.C. 242.

For these reasons, I have no doubt that the decision of the justices was right, and I am all the more glad to be able to reach that conclusion because it is particularly important that safety regulations should be observed for the employees of contractors who may be only occasional workmen in a factory and in respect of whom there is still greater need for protection against receiving fatal electric shocks. I agree that this appeal should be dismissed.

DONOVAN J. I agree, and cannot usefully add more.

Appeal dismissed.

Solicitors: *Gibson & Weldon for John Whittle, Robinson & Bailey, Manchester; Solicitor, Ministry of Labour and National Service.*

J. D. P.

1956
June 27.

Lord Goddard C.J., Ormerod and Donovan JJ.

BRYSON *v.* ROGERS.

Road Traffic — Speed limit — Goods vehicle — Vehicle not carrying goods—Appropriate speed limit—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 10 (1), *Sch. I* (*as amended by Road Traffic Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 50), *s.* 2 (1) (2))*—Road and Rail Traffic Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 53), *s.* 9 (2)*—Motor Vehicles* (*Variation of Speed Limit*) *Regulations,* 1955 (*S.I.* 1955, *No.* 1880), *regs.* 2, 3, *Sch.*

The defendant was driving an Austin pick-up van in respect of which a farmer's F. licence was held, at more than 30 miles per hour on an unrestricted road. At the time no goods were being carried in the vehicle. On a charge under section 10 (1) of the Road Traffic Act, 1930, as amended,[1] with exceeding the speed limit for goods vehicles:—

[Reported by D. TRAFFORD OWEN, Esq., Barrister-at-Law.]

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[1] Road Traffic Act, 1930 (as amended by the Road Traffic Act, 1934, s. 2 (1) and (2)), s. 10: " (1) It " shall not be lawful for any person to " drive a motor vehicle of any class or " description on a road at a speed " greater than the speed specified in " the First Schedule to . . . [the Road " Traffic Act, 1934] as the maximum " speed in relation to a vehicle of " that class or description. . . ."

Sch. I: " *Limits of Speed*. . . . 2. " *Goods vehicles*, that is to say, " vehicles constructed or adapted for " the conveyance of goods or burden " of any description:—(1) . . . (*a*) . . . " Motor cars not exceeding one ton " in weight unladen . . . 30 [miles " per hour]."

Held, that the vehicle, not being a dual-purpose vehicle, was subject, regardless of whether it was carrying goods or not, to the speed limit imposed on goods vehicles by the Motor Vehicles (Variation of Speed Limit) Regulations, 1955.[2]

Blenkin v. *Bell* [1952] 2 Q.B. 620; [1952] 1 T.L.R. 1216; [1952] 1 All E.R. 1258 distinguished.

Woolley v. *Moore* [1953] 1 Q.B. 43; [1952] 2 T.L.R. 673; [1952] 2 All E.R. 797 no longer law.

CASE STATED by the Kent justices.

On January 17, 1956, an information was preferred by the prosecutor against the defendant that he on January 7, 1956, drove a goods vehicle on a road at a speed greater than the speed specified in the Road Traffic Act, 1934, Sch. I, as the maximum speed in relation to a vehicle of that class or description, contrary to section 10 (1) of the Road Traffic Act, 1930, as amended by section 2 of the Road Traffic Act, 1934.

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[2] Motor Vehicles (Variation of Speed Limit) Regulations, 1955: "2. The provisions of the First "Schedule to the Road Traffic Act, "1930 (being the provisions set out in "the First Schedule to the Road "Traffic Act, 1934) shall be varied ". . . by the insertion at the end of "the definition of 'goods vehicles' "(that is to say, after the words "'goods or burden of any descrip-"'tion') in paragraph 2 of the "words 'but excluding dual-purpose "'vehicles.'"

"3. For the purposes of the said "provisions and of these Regula-"tions the expression 'dual-purpose "'vehicle' means a vehicle con-"structed or adapted for the carriage "both of passengers and of goods or "burden of any description being a "vehicle of which the unladen weight "does not exceed two tons and which "either—(*a*) satisfies the conditions "as to construction specified in the "Schedule to these Regulations, or "(*b*) is so constructed or adapted that "the driving power of the engine is, "or by the appropriate use of the "controls of the vehicle can be, trans-"mitted to all the wheels of the "vehicle."

Sch.: "The conditions as to the "construction of dual-purpose vehicles "referred to in paragraph (*a*) of regu-"lation 3 of these regulations are the "following:—1. The vehicle must "be permanently fitted with a rigid "roof, with or without a sliding "panel. 2.—(1) The area of the "vehicle to the rear of the driver's "seat must satisfy the following "requirements. (2) It must be per-"manently fitted with at least one "row of transverse seats, whether "fixed or folding, for two or more "passengers, and those seats must be "properly sprung or cushioned and "provided with upholstered backrests, "attached either to the seats or to a "side or the floor of the vehicle. "(3) It must be lit on each side and "at the rear by a window or windows "of glass or other transparent "material having an area or aggre-"gate area of not less than two "square feet on each side and not less "than one hundred and twenty square "inches at the rear. 3. The distance "between the rearmost part of the "steering wheel and the backrests "of the row of transverse seats satis-"fying the requirements specified in "sub-paragraph (2) . . . must, when "the seats are ready for use, be not "less than one third of the distance "between the rearmost part of the "steering wheel and the rearmost "part of the floor of the vehicle."

At the hearing of the information, it was proved or admitted that at the material time the defendant was driving an Austin pick-up van, one ton in weight unladen, in respect of which a farmer's F. licence was held, on an unrestricted road, at a speed in excess of 48 miles an hour. The vehicle was fitted with two seats, one for the driver and another for the passenger at the side of the driver's seat. The vehicle was not fitted with a rigid roof or with a four-wheel drive. All the wheels were fitted with pneumatic tyres. No goods were being carried in the vehicle at the time.

It was contended on behalf of the defendant that on the facts and as the vehicle was not being used for carrying goods no speed limit was applicable to it. It was contended by the prosecutor that by reason of the Motor Vehicles (Variation of Speed Limit) Regulations, 1955, the vehicle, whether it was or was not carrying goods, was limited to a maximum speed of 30 miles an hour.

The justices were of opinion that section 9 (2) of the Road and Rail Traffic Act, 1933, applied to the case and that that section remained unaffected by the Motor Vehicles (Variation of Speed Limit) Regulations, 1955; that the case was indistinguishable from *Woolley* v. *Moore*,[3] and that, accordingly, the vehicle, when it was not being used for carrying goods, was not limited to a maximum speed of 30 miles per hour. They therefore dismissed the information. The prosecutor appealed.

Edward Gardner for the prosecutor. The speed limits for goods vehicles were first laid down in the First Schedule to the Road Traffic Act, 1930. Section 2 (1) of the Road Traffic Act, 1934, substituted the First Schedule to the Act of 1934 for the First Schedule to the Act of 1930. The term "goods vehicles" is defined in paragraph 2 of the First Schedule to the Act of 1934 as "vehicles constructed or adapted for the conveyance of goods "or burden of any description." The vehicle in question satisfied that definition and was, prima facie, subject to the speed limit of 30 miles an hour laid down in sub-paragraph (1) of paragraph 2.

The schedule was varied by the Motor Vehicles (Variation of Speed Limit) Regulations, 1950. The effect of those regulations was explained in *Blenkin* v. *Bell*,[4] which was followed in *Woolley*

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[3] [1953] 1 Q.B. 43; [1952] 2 T.L.R. 673; [1952] 2 All E.R. 797.

[4] [1952] 2 Q.B. 620; [1952] 1 T.L.R. 1216; [1952] 1 All E.R. 1258.

v. *Moore* [5]; the former case related to a shooting brake, the latter case extended the principle laid down in *Blenkin* v. *Bell* [6] to a vehicle which was not a shooting brake. Both cases concerned the test to be applied to determine liability for exceeding the speed limit for goods vehicles. *Blenkin* v. *Bell* [6] decided that the matter depended on whether or not, at the time the alleged offence was committed, the vehicle was being used for the carriage of goods; if it was, it was subject to the appropriate speed limit for a goods vehicle. If it was not, but was being used for a purpose for which it could be lawfully used without the authority of a licence, it was exempt from the speed limit.

The Regulations of 1950 were revoked by the Motor Vehicles (Variation of Speed Limit) Regulations, 1955. These regulations exclude dual-purpose vehicles from the category of goods vehicles, providing for the insertion of the words " but excluding dual-" purpose vehicles " after the definition of " goods vehicles " in paragraph 2 of the Schedule to the Act of 1934. If, therefore, a goods vehicle is to escape the speed limits laid down in paragraph 2 it must satisfy the definition of a dual-purpose vehicle contained in regulation 3 of the Regulations of 1955. The vehicle in question did not satisfy regulation 3 (*a*), since it did not have a rigid roof as required by the conditions as to construction contained in the schedule to the regulations. Nor did it satisfy paragraph (*b*) of regulation 3, since it did not have a four-wheel drive. The vehicle was not, therefore, a dual-purpose vehicle and must be regarded for the purposes of the speed limit as a goods vehicle, and subject at all times to a speed limit of 30 miles an hour.

The defendant did not appear and was not represented.

LORD GODDARD C.J. The vehicle in question was constructed for the carriage of goods, and, therefore, prima facie, it was a goods vehicle. But there was a case in 1952—*Blenkin* v. *Bell* [1]—in which this court had to consider the case of what is commonly called a " shooting brake," which is now much used by motorists, because it is convenient for carrying garden produce or luggage. After going through the tangle of sections and regulations, the court was forced to the conclusion that the question, whether the speed limit applicable to a goods vehicle applied, did not depend upon whether the vehicle had a carrier's licence or not; it depended on whether at the time it was being used for carrying goods, in which case it was limited to 30 miles an hour, or merely for carrying pasengers, when it would not be affected by a speed limit and would not require a special licence. Of course, it would require more than the ordinary road licence, but not the particular licence which has to be issued under the Road and Rail Traffic Act, 1933. The position was, therefore, that small vehicles, that is to say, vehicles which do not weigh over three tons—the ordinary grocer's van is a very good illustration—were not confined to 30 miles an hour unless they were carrying goods. That was the decision the court came to after it had carefully examined the mass of sections and regulations.

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[5] [1953] 1 Q.B. 43.

[6] [1952] 2 Q.B. 620.

[1] [1952] 2 Q.B. 620; [1952] 1 T.L.R. 1216; [1952] 1 All E.R. 1258.

Blenkin v. *Bell*[2] was followed by this court in *Woolley* v. *Moore*.[3] In that case the magistrates evidently thought that some limit must be put upon the decision in *Blenkin* v. *Bell*.[4] I think that they thought of the consequences which might follow from the decision rather than the grounds of the decision. When the grounds of the decision were examined, it was found that it applied to a delivery van—which was the vehicle in question in *Woolley* v. *Moore*[5]—as well as to a shooting brake; so the test finally fixed, on the basis of the regulations as they then stood, was whether the van, at the time it was being driven at over 30 miles an hour, was carrying goods or only carrying luggage or personal effects for which no special carrier's licence would be required. If it was carrying goods, it was confined to 30 miles an hour. If the driver, having delivered all his goods, wanted to go home, he could drive at any pace he liked on an unrestricted road. Although the court did not think that it was an altogether satisfactory decision, they said that the decision was consistent with common sense and justice having regard to the somewhat complicated state of the regulations.

In July of 1955, the Minister saw fit to exercise the power conferred on him by statute, under which he can vary the speed limit applicable to different kinds of vehicles, and made the Motor Vehicles (Variation of Speed Limit) Regulations, 1955. He left the decision in *Blenkin* v. *Bell*[6] untouched, but brought within the scope of the 30 mile limit the tradesman's delivery van. He did it in this way: he said that the 30 mile an hour limit which is imposed on goods vehicles should not apply to a dual-purpose vehicle as defined in the regulations. That leaves the shooting brake untouched. If a goods vehicle is not a dual-purpose vehicle as defined then the 30 mile an hour limit will apply whether it is carrying goods or not.

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[2] [1952] 2 K.B. 620.

[3] [1953] 1 Q.B. 43; [1952] 2 T.L.R. 673; [1952] 2 All E.R. 797.

[4] [1952] 2 Q.B. 620.

[5] [1953] 1 Q.B. 43.

[6] [1952] 2 Q.B. 620.

In the present case the magistrates found that the vehicle in question was not a dual-purpose vehicle, because they found that it was not fitted with a rigid roof. That is the first requirement to be found in the definition of a dual-purpose vehicle in the schedule to the Regulations of 1955, paragraph 1. The one thing this vehicle had not got was a rigid roof. If it was not fitted with a rigid roof, it follows that it did not answer the first requirement that a dual-purpose vehicle for the purpose of these regulations must answer.

For these reasons, the magistrates came to a wrong determination in thinking that the cases to which I have referred applied to this case and that an offence had not been committed. This was the case of a vehicle which they described as an Austin pick-up van to which a farmer's F. licence had been granted. I do not know what is meant exactly by a pick-up van, but whatever it is it does not answer the conditions as to the construction of a dual-purpose vehicle set out in the schedule to the regulations. It is obvious that the vehicle, on its description, is a goods vehicle, and, therefore, must not be driven at more than 30 miles an hour.

The usefulness of this decision is that it ought to be well understood by tradesmen's drivers that tradesmen's delivery vans cannot be driven lawfully at more than 30 miles an hour, and it does not matter whether they are laden or unladen; the new regulations make that perfectly clear. For these reasons, this case must go back to the magistrates with a direction that the offence was proved.

ORMEROD J. I agree.

DONOVAN J. The magistrates have given certain reasons for holding that the new regulations of 1955 do not apply to this particular vehicle, and they refer to section 9 (2) of the Act of 1933. It would have been more satisfactory if one understood those reasons; but perhaps it is not surprising, when Mr. Gardner, who is well versed in these matters, does not understand them, that one cannot understand them oneself. I agree with the judgment proposed.

Solicitor: *Sharpe, Pritchard & Co.*

1956
June 28, 29.

Sellers J.

GOVERNMENT OF GIBRALTAR *v.* KENNEY AND ANOTHER.

[1956 G. No. 854.]

Arbitration — Arbitrator — Jurisdiction — Frustration — Incidental claims — Contract for the rendering of professional services— "Any dispute or difference . . . in relation to any thing or "matter arising out of or under this agreement . . . shall be "referred" to arbitration — Allegation that contract frustrated —Claim for remuneration on quantum meruit and for compensation under Law Reform (Frustrated Contracts) Act, 1943*— Whether claims "arising out of . . . agreement"—Whether claims within scope of reference to jurisdiction—Law Reform (Frustrated Contracts) Act,* 1943 (6 *&* 7 *Geo.* 6, *c.* 40), *s.* 1 (3).

A contract, by which it was agreed that the defendant, a quantity surveyor, should render certain professional services to the plaintiff in consideration of payments mentioned therein, contained the following arbitration clause: "If any dispute or difference shall "arise or occur between the parties hereto in relation to any thing "or matter arising out of or under this agreement the same shall be "referred to . . . [an] . . . arbitrator." After completion of the works disputes arose between the plaintiff and the defendant and on an arbitrator being appointed on the application of the defendant, the defendant delivered points of claim which included, inter alia, (a) a claim for remuneration on a quantum meruit for the whole of the work performed on the footing that the contract was frustrated and had ceased to have any effect, and (b) an alternative claim for compensation under the Law Reform (Frustrated Contracts) Act, 1943, in respect of the benefit to the plaintiff of the work performed by him under the contract up to the date of frustration and thereafter remuneration on the basis of a quantum meruit. The plaintiff, while making no objection to the arbitrator hearing the rest of the defendant's claims, sought, as against the defendant, a declaration that the arbitrator had no jurisdiction to hear and determine those parts of his claim set out above on the ground that they did not arise out of the contract, and were therefore outside the ambit of the reference to arbitration. It was conceded that the arbitrator had jurisdiction to determine whether the contract was frustrated:—

Held, (1) that the court had jurisdiction to grant the declaration if it ought to be granted on the merits.

North London Railway Co. v. *Great Northern Railway Co.* (1883) 11 Q.B.D. 30 and *Steamship Den of Airlie Co. Ltd.* v. *Mitsui & Co. Ltd.* (1912) 106 L.T. 451 distinguished.

(2) That, in the circumstances of the case, the claim for quantum meruit was in close association with the contract and was an incident which arose as a consequence of the contract and was, therefore, a claim "arising out of" the agreement within the meaning of the arbitration clause.

(3) That where a contract was frustrated, an arbitration clause survived for the purpose of measuring claims arising out of the frustration and that the defendant's claim under the Law Reform (Frustrated Contracts) Act, 1943, was incidental to and so linked up with the contract that had existed before frustration that it properly fell within the submission to arbitration. The arbitrator, accordingly, had jurisdiction in relation to all the claims made by the defendant.

Heyman v. *Darwins Ltd.* [1942] A.C. 356; 58 T.L.R. 169; [1942] 1 All E.R. 337 applied.

ACTION.

By a contract in writing dated April 25, 1946, made between the plaintiff, the Government of Gibraltar, acting by its agent, the Crown Agents for the Colonies, and the first defendant, Cyril Ernest Kenney, a quantity surveyor, it was agreed that in consideration of certain payments the defendant would render professional services to the plaintiff as quantity surveyor in connexion with a scheme of works consisting of the construction of blocks of flats and other ancillary works at Alameda Gardens, Gibraltar. Clause 9 of the contract provided that "If any dispute or difference shall arise or occur between the parties hereto in relation to any thing or matter arising out of or under this agreement the same shall be referred to some person nominated as single arbitrator by the President for the time being of the Chartered Surveyors' Institution and this agreement shall be deemed to be a reference to arbitration within the meaning of the Arbitration Acts, 1889 to 1934, or any statutory modification or re-enactment thereof."

In August, 1955, after the works in Gibraltar had been completed and the last claim by the building contractors settled, disputes arose between the plaintiff and the defendant, and the defendant applied to the President of the Chartered Surveyors' Institution for the appointment of an arbitrator pursuant to the provisions of clause 9 of the contract. In response to the application Cecil Tom Every, the second defendant, a Fellow of the Royal Institute of Chartered Surveyors, was appointed as arbitrator. In December, 1955, the first defendant delivered points of claim,[1] which included, inter alia (by paragraphs 7, 10 and 11), claims which, in effect, were as follows: (a) A claim for remuneration

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[1] By his points of claim the defendant alleged, inter alia, that before the contract was signed he had, at the request of the plaintiff, already performed certain services in connexion with the scheme of works, and that on April 25, 1946, and at all material times before that date it was contemplated by the parties and the agreement was by necessary implication entered into on the footing that (a) tenders would be obtained and a tender would be accepted in or before June, 1946; (b) approximately 726 flats in 14

blocks together with ancillary works would be built; (c) work on the site would be commenced within approximately three months of the acceptance of a tender and would proceed in a regular manner and be finally completed within about 30 months of the acceptance of the tender; (d) the drawings upon which the bills of quantities were being prepared would be used for the execution of the works; (e) the services involved in making interim valuations would be no more onerous than usual in a scheme including a large volume of repetitive work; and (f) it would be possible to prepare a final account in under 12 months after completion of work on the site, and his duties would be concluded in approximately three-and-a-half years from June, 1946. By paragraph 5 he alleged (a) that tenders were in fact obtained in June, 1946, but none of those were accepted, and on October 1, 1946, the plaintiff instructed certain contractors to proceed with a modified scheme for the construction of 472 flats in seven blocks together with ancillary works for the sum of £1,799,000; on May 6, 1947, the plaintiff entered into a formal contract with the contractors for such modified scheme; (b) that the sites for two of the blocks were not made available by the plaintiff and that two blocks on different sites were eventually substituted; (c) that very little work was done on site until the middle of 1947, and thereafter the works proceeded irregularly and were not completed until April 30, 1951, nearly twice the anticipated period; (d) that fresh one-eighth scale drawings for a number of blocks were issued at various dates, beginning from July, 1947, and the drawings from which bills of quantities were prepared were not used, which made the preparation of interim valuations and the final account much more burdensome than it otherwise would have been; (e) that the number of interim valuations was greatly increased owing to the delay, and much extra work was involved in checking materials on site and calculating increased costs; (f) that it was not possible to complete a final account until June 15, 1953; in June, 1953, the contractors submitted claims for extra payment arising from unusual stipulations permitted to be included in their contract and the defendant was required to render services in advising upon those claims; and that it was not until those claims were settled that his duties finally came to an end.

By reason of those matters the defendant alleged that the agreement of April 25, 1946, ceased to have any application to the services rendered by him and/or was frustrated.

By paragraph 7 the defendant alleged that he "rendered the services listed ". . . at the express or implied request "of the [plaintiff] and in the premises "is entitled to be paid therefor on a "quantum meruit. Reasonable remuneration for the said services is "the sum of £107,960 10s., details "of which are given. . . . Alternatively the [defendant] is entitled to "recover that part of the said sum "which represents remuneration for "the services performed before the "said agreement was frustrated as "being the value of the benefit obtained by the [plaintiff] by reason "of such services under section 1 (3) "of the Law Reform (Frustrated Contracts) Act, 1943, and the remainder "of the said sum on a quantum "meruit. The [plaintiff] has paid "the [defendant] sums amounting to "£25,842 10s., leaving a balance due ". . . of £82,118"; and there were listed particulars of services rendered amounting to £107,960 10s. as follows: (1) preparation of bills of quantities, (2) valuing for interim certificates, (3) remeasurement of works and preparation of final account and out-of-pocket expenses in connexion therewith, (4) drafting building contract, (5) preparing special report and statement of reductions on tender, (6) preparing reduction bill, (7) attending meetings and special inquiry, (8) preparing special report on delays, (9) special valuation of work at end of on a quantum meruit in respect of services rendered to the plaintiff (reasonable remuneration for which he alleged to be £107,960 10s.), on the basis that the agreement of April 25, 1946, had ceased to have any application to the services rendered by him and/or was frustrated; alternatively, (b) that part of that sum which represented remuneration for services performed before the contract was frustrated as being the value of the benefit obtained by the plaintiff by reason of such services under section 1 (3) of the Law Reform (Frustrated Contracts) Act, 1943,[2] and the remainder of that sum on a quantum meruit; (c) a claim in respect of remuneration for further services carried out at the request of the plaintiff outside the provisions of the agreement but consequential thereupon.

No points of defence were delivered, but on February 20, 1956, the plaintiff wrote to the arbitrator inviting him to consider whether he had jurisdiction to determine the above claims; the arbitrator heard argument on behalf of both parties and on

1947, (10) special valuation of plaintiff's own flats, (11) special examination of books and documents of the plumbing sub-contractors, (12) examination of books of specialists called in to rectify plumbing, and (13) attendance and reporting to Crown Agents.

By paragraph 10: "The [defendant] "carried out further services at the "request of the [plaintiff] outside the "provisions . . . of the agreement "but consequential thereupon and is "entitled to be paid extra for the "same. The services outside the . . . "provisions are those numbered 4 to 9 "and 11 to 13 inclusive in the parti"culars of service under paragraph 7 "hereof and the extra payment of the "total value of those services amounts "to £2,886 10s. The [defendant] also "carried out a special service at the "request of the [plaintiff] as set out "in item 10 of the aforesaid particu"lars in respect whereof he is entitled "to be paid reasonable remuneration "in the sum of £338." By paragraph 11: "The total sum due to the "[defendant] under paragraphs 9 and "10 hereof is £29,991 and the [plain"tiff] has paid . . . no more than "£25,842 10s., leaving a balance due ". . . of £4,158 10s."

The points of claim went on to allege a number of implied terms of the agreement, and breach of them by the plaintiff, for which the defendant claimed damage.

[2] Law Reform (Frustrated Contracts) Act, 1943, s. 1: "(1) Where "a contract governed by English law "has become impossible of perform"ance or been otherwise frustrated, "and the parties thereto have for "that reason been discharged from "the further performance of the con"tract, the following provisions of "this section shall, subject to the "provisions of section 2 of this "Act, have effect in relation "thereto. (3) Where any party to "the contract has, by reason of any"thing done by any other party "thereto in, or for the purpose of, the "performance of the contract, "obtained a valuable benefit . . . "before the time of discharge, there "shall be recoverable from him by "the said other party such sum (if "any), not exceeding the value of the "said benefit to the party obtaining "it, as the court considers just, "having regard to all the circum"stances of the case. . . ."

S. 3 (2): "In this Act the expres"sion 'court' means, in relation to "any matter, the court or arbitrator "by or before whom the matter falls "to be determined."

April 27, 1956, informed them that in his opinion he had jurisdiction to determine all the claims made in the points of claim and he directed the plaintiff to deliver its points of defence within 35 days.

The plaintiff, contending that the claims of the defendant in paragraphs 7, 10 and 11 of his points of claim summarized above fell outside the ambit of the reference to arbitration contained in clause 9 of the contract, brought these proceedings against the first defendant and the arbitrator for (1) a declaration that the arbitrator had no jurisdiction in the arbitration to hear or determine the claims in question; (2) an order restraining the arbitrator from hearing or purporting to determine those claims in the arbitration; and (3) such further or other relief as to the court should seem just.

The action was directed to be tried without delivery of a defence.

The second defendant, the arbitrator, did not appear and took no part in the proceedings.

John Donaldson for the plaintiff. It is conceded that in proceedings of this nature the allegations of fact contained in the points of claim delivered by the defendant in the arbitration must be accepted as correct. On that basis it is not contested that certain of the defendant's claims are within the jurisdiction of the arbitrator and the plaintiff does not seek to resile from the arbitration clause, but takes the view that the matters could be more conveniently investigated in Gibraltar, where the services were rendered, and that the courts of Gibraltar are the proper forum.

[SELLERS J. It seems undesirable, and is neither good sense nor good business, to encourage two sets of proceedings.]

An agreement to arbitrate amounts to a contracting out of the jurisdiction of the court and, therefore, any matter which is not strictly within the submission can only go to arbitration by agreement.

The arbitrator has no jurisdiction to make an award on the defendant's claim for quantum meruit; his jurisdiction is limited to any matter "arising out of or under this agreement." It is not challenged that he can determine whether or not the agreement has ceased to apply and can award remuneration under the terms of the agreement, but the agreement of April 25, 1946, is irrelevant to the defendant's claim for quantum meruit because quantum meruit arises on a contract implied by law on the basis that there is no express contract binding on the parties. The quantum meruit claim, therefore, cannot arise unless the agreement has ceased to bind the parties, but if that agreement has gone, so also has the arbitration clause. If the defendant wants to claim on a quantum meruit and also under the contract, he must sue and not go to arbitration.

It is conceded that the question whether or not the contract has been frustrated is a matter for the arbitrator to decide: *Kruse* v. *Questier & Co. Ltd.*,[3] following dicta in *Heyman* v. *Darwins Ltd.*[4] At common law, once a contract was frustrated the loss lay where it fell; the Law Reform (Frustrated Contracts) Act, 1943, operates to restore the parties to their original position so far as can be and to award what is in the nature of a bare statutory quantum meruit, but it does not operate as a term of the contract or in relation to it, save as a matter of history. The words "in "relation thereto" in section 1 (1) apply, not to the contract which has been frustrated as giving rise to any rights, but to the situation "Where a contract . . . has become impossible of per-"formance or been otherwise frustrated," and the parties for that reason have been excused from further performance; the right under the Act arises from the fact that there is no contract at all. Assuming, therefore, that the arbitrator finds, as he is entitled to do, that the contract has been frustrated he would have no jurisdiction to make any award as claimed by the defendant under the Act. [Reference was also made to *Parkinson (Sir Lindsay) & Co. Ltd.* v. *Commissioners of His Majesty's Works and Public Buildings.*[5]]

Neil Lawson Q.C. and *R. D. Stewart-Brown* for the defendant. The claims of the defendant are within the scope of the submission to arbitration. The court reads such submissions widely and will permit an arbitrator to exercise powers in respect of consequential relief. The absence of an express power to consider damages does not oust the jurisdiction of an arbitrator in that respect: see *per* Viscount Simon L.C. in *Heyman* v. *Darwins Ltd.*[6] In *Heyman* v. *Darwins Ltd.* Lord Macmillan said [7] that repudiation or total breach did not abrogate a contract, but that it survived for the purpose of measuring the claims arising out of the breach, and that an arbitration clause, which was not one of the purposes of the contract, survived for determining the mode of their settlement. It is a fallacy to say that the position on repudiation, which is similar to frustration, is different from that on frustration with regard to consequential relief, and there is no reason why those observations should not apply equally to a case of frustration or why the arbitration clause, which is not one of the purposes of the contract which has been frustrated, but is machinery for determining the damages, should not survive in such a case. It is also a fallacy to say that an arbitrator has power to determine quantum where a claim is merely for damages for breach of contract, but that he has no power to do so if a claim is put on quantum meruit: in this respect see the remarks of Lord Porter in *Heyman* v. *Darwins Ltd.*[8] to the effect that, on repudiation, it was immaterial whether or not the injured party sued on the contract, or neglected the contract and sued on quantum meruit. There is no difference in principle between relief consequential on repudiation and relief consequential on frustration on quantum meruit; both flow from the contractual relationship which existed between the parties and in each case the claim is made because the contractual relationship which did exist has come to an end. Although at common law quantum meruit is based on an implied contract, it is not right to say that in determining what a party is entitled to on a quantum meruit everything except the work performed by that party must be disregarded; regard must be had to the whole of the circumstances flowing from the contractual relationship between the parties. [Reference was also made to *Woolf* v. *Collis Removal Service*[9] and *Davis Contractors Ltd.* v. *Fareham Urban District Council.*[10]]

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[3] [1953] 1 Q.B. 669; [1953] 1 All E.R. 954.

[4] [1942] A.C. 356; 58 T.L.R. 169; [1942] 1 All E.R. 337.

[5] [1949] 2 K.B. 632; [1950] 1 All E.R. 208.

[6] [1942] A.C. 356, 366, 367.

[7] Ibid. 374.

In any event, this is not a case in which the court has jurisdiction to grant the relief asked for by the plaintiff. The court will not interfere by injunction or by declaratory relief the effect of which would be to prevent an arbitration being proceeded with, whether or not the subject-matter of the dispute falls within the agreement to refer (*North London Railway Co.* v. *Great Northern Railway Co.*[11]), unless the agreement under which the reference is made is itself attacked (*Kitts* v. *Moore*[12]); and see *Steamship Den of Airlie Co. Ltd.* v. *Mitsui & Co. Ltd.*,[13] where, as here, there was a claim for declaratory relief to the effect that the arbitrator had no jurisdiction. Even where the agreement itself is attacked the court will not always grant such relief: see also *Turk Gemi Kurtama* v. *Ithaka (Owners)* [14] and *Sissons* v. *Oates*.[15] The present action by the plaintiff, therefore, is premature and misconceived.

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[8] [1942] A.C. 397.

[9] [1948] 1 K.B. 11; 63 T.L.R. 540.

[10] [1956] A.C. 696; [1956] 3 W.L.R. 37; [1956] 2 All E.R. 145.

[11] (1883) 11 Q.B.D. 30.

[12] [1895] 1 Q.B. 253.

[13] (1912) 106 L.T. 451.

The court leans against a double trial, a fortiori where the question of fact and law would fall to be determined by an arbitrator and the quantum by the court. It has been conceded that the questions whether or not the contract has ceased to have effect or has been frustrated are proper matters for the arbitrator to decide; if the arbitrator should decide either of those matters in favour of the defendant, and was unable to make an award, it would mean that two sets of proceedings would be required. Furthermore, the matters relied upon in support of the allegation of frustration are in substance the same as those relied upon as constituting breaches of contract, so that, if two sets of proceedings are required, the same matters will have to be investigated in each. Moreover, the question which the plaintiff is asking this court to decide is hypothetical and academic, because it is not known whether the arbitrator will in fact find that the contract has been frustrated or has ceased to be of any effect; if the findings of the arbitrator on either of those issues is in fact unfavourable to the plaintiff it has a remedy by case stated under section 21 (1) of the Arbitration Act, 1950. The court has a discretion in the matter of declaratory relief, and is cautious in granting such relief. If, therefore, there is power to grant the relief asked for, it is submitted that, on the balance of convenience and taking all the circumstances into account, this is not a case in which the court should exercise its discretion in favour of the plaintiff.

John Donaldson in reply. If the arbitrator has no power to award compensation under the Law Reform (Frustrated Contracts) Act, 1943, the issue which he has power to determine, whether or not the contract has been frustrated, is a sterile issue and the defendant should not be allowed to proceed with it. The dicta in *Heyman* v. *Darwins Ltd.*[16] relied on by the defendant do not apply in this case. Lord Porter said that, on repudiation, the injured party had a choice either to sue upon the contract or to neglect the contract and sue on quantum meruit; there is nothing to suggest that those remarks apply to an arbitration, or that the injured party may combine both claims in an arbitration. The question is: what must the parties be deemed to have intended by the arbitration clause? The clause does not refer to any dispute arising out of the performance of the work, or out of similar work, or to any claim (as in *Woolf* v. *Collis Removal Service*[17]), but is restricted to "any thing or matter arising out "of or under" this agreement. One of the claims made by the defendant is based upon the fact that the contract is gone, and the other on the fact that it has no application. Neither of those claims are things or matters arising out of or under the contract.

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[14] [1939] 3 All E.R. 630.

[15] (1894) 10 T.L.R. 392.

[16] [1942] A.C. 356, 397.

It is submitted that the court has jurisdiction to grant the relief sought. In *North London Railway Co.* v. *Great Northern Railway Co.*[18] the "whole matter" was beyond the jurisdiction of the arbitration: see the judgment of Brett L.J.[19] That case only decided that where the whole matter is outside the jurisdiction of the arbitrator and no legal injury will result to plaintiffs from defendants asserting a right to arbitration which they have not got the court will not grant an injunction. In this case part of the proceedings are admittedly within the jurisdiction of the arbitrator; should the arbitrator make a lump sum award in the defendant's favour, that would be an irreparable injury to the plaintiff, for it would not be known on what part of the claim the award was based and the plaintiff, who could not compel the arbitrator to show on what basis his award was made, could not raise the question of jurisdiction at a later stage. The plaintiff, therefore, has no alternative to the present proceedings. In *Farrar* v. *Cooper*[20] Kekewich J. placed the jurisdiction of the court in matters such as this on discretion and assessment by the court of the damage likely to result to the plaintiff; here the plaintiff is in peril of a lump sum award which would leave it without a remedy. The declaratory jurisdiction of the court is very wide and, even if there is no jurisdiction to grant an injunction, the court has jurisdiction to make a declaration. [Reference was also made to *J. H. Vantol Ltd.* v. *Fairclough, Dodd & Jones Ltd.*,[21] the Annual Practice (1956), p. 425, notes to R.S.C., Ord. 25, r. 5, and to *Howard* v. *Pickford Tool Co.*[22]] In the case of a bona fide dispute such as this the court should not decline to make a declaration which would enable the parties to define their position.

SELLERS J. This case, which has been well and fully argued, has given rise to some somewhat difficult questions, but I have arrived at a conclusion on the matter which I think it desirable to state now without the necessity of expressing views on a number of the matters which have been discussed.

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[17] [1948] 1 K.B. 11.

[18] 11 Q.B.D. 30.

[19] Ibid. 35, 36.

[20] (1890) 44 Ch.D. 323; 6 T.L.R. 241.

[21] [1955] 1 W.L.R. 642; [1955] 2 All E.R. 516 (reversed C.A. [1955] 1 W.L.R. 1302; [1955] 3 All E.R. 750).

[22] [1951] 1 K.B. 417.

The plaintiff brings these proceedings against the first defendant, a quantity surveyor, who had an agreement with them to perform some work in his professional capacity, and also against the second defendant, Mr. Cecil Tom Every, who, at the moment, is an arbitrator who has been appointed in accordance with an arbitration clause in the contract under which the first defendant was doing the work for the plaintiff. The action asks for a declaration relevant to that arbitration to this effect: "That the "second defendant has no jurisdiction to hear or determine the "claims by the first defendant set out in [certain paragraphs of "the claim] in an arbitration between the plaintiff and the first "defendant," and also for an order against the arbitrator restraining him from hearing or purporting to determine the matters against which complaint has been made.

As soon as the proceedings were launched, the arbitrator took the very proper course of notifying the plaintiff that he would take no part in the proceedings, but would abide by any order which the court might make. As a consequence counsel for the plaintiff asks for no further order against the arbitrator, and the proceedings have been pursued for the declaration asked against the first defendant.

[His Lordship referred to the facts as set out above and continued:] The plaintiff does not seek to say that the arbitrator has no jurisdiction at all on any of the matters claimed by the defendant in the points of claim, and the present action is based on three matters in particular which, it is alleged, do not fall within the submission to arbitration under clause 9 of the contract. The issues in the claim as framed by the defendant and not yet defined by any points of defence by the plaintiff can be placed in five classes: There is a claim under the contract, based on the express terms of the contract, for a sum of money still outstanding which will call for consideration, and also an allegation that there has been a breach of the agreement in various matters and that damages flow from that breach which are recoverable. Insofar as the claim is referable to those matters no complaint is made that they are not properly the subject of the arbitration, but there are three other matters which, it is said, are not appropriate to the arbitration and are outside its scope. They can be briefly summarized thus: First, a claim not under the contract at all but for quantum meruit, for no less than £107,000 odd, which is to be compared with remuneration under the contract of something like £25,000. The claim for the quantum meruit is based on allegations that the agreement ceased to have any application to the services rendered by the defendant as quantity surveyor or that it was frustrated. Secondly, an alternative claim, on the basis of frustration of the contract, that the defendant is entitled to recover that part of the sum which represents remuneration for his services under the contract under the Law Reform (Frustrated Contracts) Act, 1943, by reason of the benefit to the plaintiff of the work done in so far as the contract was performed up to the date of frustration, and thereafter a claim for a quantum meruit with regard to the other work. The third claim which is said to be outside the submission to arbitration and, therefore, outside its scope, is in relation to some further services alleged to have been performed by the defendant outside the provisions of the agreement, but consequential thereon, in particular work done in assessing the quantities on another building altogether.

The third claim was not pressed as being wholly outside the province of the arbitrator, and if the arbitrator is rightly entitled to adjudicate upon a quantum meruit which is claimed in two different ways for different amounts and is entitled to adjudicate on the claim under the Law Reform (Frustrated Contracts) Act, 1943, then it was not sought to say that that kind of claim would not be appropriate in the arbitration. The question, therefore, that arises is whether the plaintiff is right in saying that the other two heads of claim fall outside the ambit of the arbitration clause.

Mr. Neil Lawson, for the defendant, said that whatever the appropriate decision ought to be upon that matter, this court has no jurisdiction to determine it, and he relied on *North London Railway Co.* v. *Great Northern Railway Co.*[1] where, according to the headnote, which I think accurately states the effect of what was said by Brett and Cotton L.JJ. in that case, it was held that ". . . the High Court has no jurisdiction to issue an "injunction to restrain a party from proceeding with an arbitra"tion in a matter beyond the agreement to refer, although "such arbitration proceeding may be futile and vexatious." Mr. Lawson also relied on the decision in *Steamship Den of Airlie Co. Ltd.* v. *Mitsui & Co. Ltd.*,[2] where the *North London Railway* case [3] was followed.

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[1] (1883) 11 Q.B.D. 30.

[2] (1912) 106 L.T. 451.

[3] 11 Q.B.D. 30.

Mr. Donaldson sought to distinguish the *North London Railway* case [3] on the ground that in that case the whole of the matter in dispute and under discussion was beyond the jurisdiction of the arbitrators, and he pointed out that that was not the circumstance here, for in this case it is only part of the arbitrator's jurisdiction that is being challenged and, if the court refused to interfere great injustice might be visualised because of the form in which the award might be framed in that there might not be a clear differentiation between the decision on the matters which are appropriate for the arbitrator's consideration and those which the plaintiff wishes to say are outside his jurisdiction. I think that that is clearly a distinction between those cases and the present one, but this is not a case in which an injunction is sought against the first defendant, it is a claim for a declaration. Although a declaration was asked for in conjunction with an injunction in the *Den of Airlie* case [4] it seems to me that there may be circumstances where the court could appropriately make a declaration where it might not, on those authorities, be able to grant an injunction. The position with regard to an injunction was in some way modified in the view of Kekewich J. in *Farrar* v. *Cooper*,[5] but however that may be, having regard to the fact that in this case an injunction is not asked for against the first defendant, I would not, I think, have felt myself restricted in granting the declaration sought had I come to the conclusion on the merits that it was one which I ought to grant in favour of the plaintiff.

I must now deal with the merits of the claim as it is framed before me. The question has to be judged by an interpretation of the arbitration clause and the claims which are sought to be made in the arbitration.

In my view, this arbitration clause is very wide. It covers " any dispute or difference " which arises or occurs between the parties " in relation to any thing or matter arising out of or under " this agreement." The distinction between matters " arising " out of " and " under " the agreement is referred to in most of the speeches in *Heyman* v. *Darwins Ltd.*[6] in the House of Lords and it is quite clear that " arising out of " is very much wider than " under " the agreement. This clause very widely incorporates a difference or dispute in relation to " any thing or matter

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[3] 11 Q.B.D. 30.

[4] 106 L.T. 451.

[5] (1890) 44 Ch.D. 323; 6 T.L.R. 241.

[6] [1942] A.C. 356; 58 T.L.R. 169; [1942] 1 All E.R. 337.

"arising out of" as well as "under" the agreement, and, in my view, everything which is claimed in this arbitration can be said to be a dispute or difference in relation to any thing "arising out "of" the agreement.

It is true that a quantum meruit is a quasi-contract and arises, in a sense, on an implied contract and not on any express agreement, but, in my view, in the circumstances of this case (although it may not be in all cases) the quantum meruit is an incident which arises out of the contract. It is not a remedy for breach nor does it arise on frustration, but it is an incident, which does arise as a consequence of the contract or "arising out of" it. It is only necessary to look at the points of claim and to visualize what will be involved in the arbitration to see the close association between the written contract and the claim advanced in this way on a quantum meruit.

The issue whether there has been a frustration giving rise to a quantum meruit or giving rise to a claim under the Law Reform (Frustrated Contracts) Act, 1943, is wrapped up with all the terms of the contract and its purported performance. Until the arbitrator has decided that issue on the contract and what took place in purported performance and all the circumstances, no question of the quantum meruit arises. Indeed, it would give rise to a difficult and highly unsatisfactory position if the arbitrator were to be left to decide whether the facts and circumstances amounted to a frustration or to a repudiation of the contract, or, putting it in another way, whether they were such that the contract had ceased to exist, and then, having arrived at that conclusion, it should be said that the matter as to quantum had to be referred to the court. Notwithstanding the effort Mr. Donaldson made to satisfy me that there were good reasons for this attempt to invoke the court for part of the claim, I am afraid that I have not been convinced. I can well understand that the more complicated matters, not of quantity, but of law and fact, to decide the issues of frustration or repudiation might be appropriate to the court, but it seems to me most inappropriate that the court should be asked to assess the sum on the basis of the findings of the arbitrator in relation to other matters.

If, as I think, the claim for quantum meruit is incidental to the contract and, therefore, within the arbitration clause, so, I think, is the alternative claim under the Law Reform (Frustrated Contracts) Act, 1943. It requires the same investigation of the contract and its terms and the performance under it, and is so closely linked up with the contract which existed until it was frustrated that I think that it properly falls within the submission.

Very little authority has been referred to in relation to this particular aspect of the case. The matter did not arise in *Heyman* v. *Darwins Ltd.*,[7] the case which has been most referred to, although there are indications of the view their Lordships might have taken if a claim for a quantum meruit had arisen there. Viscount Simon L.C. said[8]: "By the law of England (though "not, as I understand, by the law of Scotland), such an arbitra-"tion clause would also confer authority to assess damages for "breach, even though it does not confer on the arbitral body "express power to do so," which goes to show that, in the view of the Lord Chancellor, incidental relief, although not expressly stated in the submission, would be within the jurisdiction.

Lord Macmillan, dealing with the effect of repudiation, said[9]: "I am, accordingly, of opinion that what is commonly called "repudiation or total breach of a contract, whether acquiesced "in by the other party or not, does not abrogate the contract, "though it may relieve the injured party of the duty of further "fulfilling the obligations which he has by the contract under-"taken to the repudiating party. The contract is not put out of "existence, though all further performance of the obligations "undertaken by each party in favour of the other may cease. It "survives for the purpose of measuring the claims arising out of "the breach, and the arbitration clause survives for determining "the mode of their settlement. The purposes of the contract "have failed, but the arbitration clause is not one of the purposes "of the contract." I think that the important words there are that "it survives for the purpose of measuring the claims arising "out of the breach," and it seems to me that that observation could be equally applied to "claims arising out of the frustration."

For those reasons, I find and hold that the plaintiff is not entitled to the declaration for which it asks. It is, perhaps, not for me to emphasize, but I have already indicated that, so far as I can visualize this matter, it would greatly inconvenience any further pursuance of this dispute if the view which I took of the matter had been different and I had to give effect to the claim which is made and make a declaration that this particular dispute had to be tried in two parts, partly before the arbitrator and partly before the court. There may be cases where there is a clear separation of the issues and one or more may be said to be wholly outside the submission, but I do not find that to be the case here and, so far as I can visualize it, great difficulty would ensue if my order had to be to the contrary.

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[7] [1942] A.C. 356.

[8] Ibid. 366.

[9] Ibid. 374.

Therefore, it only remains for me to add that if any discretion does arise in this case—and I am not sure that it does—and if I had felt that the declaration asked for was one which might be given, I should not, as I understand the circumstances of this case, have exercised my discretion in favour of the plaintiff's claim. I think that good sense and good reason, in the particular circumstances of this case, do not justify a separation of the issues of the claim which the quantity surveyor is making against the Government of Gibraltar. Therefore I dismiss the claim.

Judgment for the defendant.

Solicitors: *E. F. Turner & Sons; Jaques & Co.*

J. F. L.

C. C. A.

1956
June 4, 8.

Lord Goddard C.J., Streatfeild and Donovan JJ.

REGINA *v.* INGRAM.

Criminal Law—Fraud—Obtaining credit by fraud—"Obtaining credit" —Contracts to carry out electrical work—Payments received in advance—Failure to carry out work—No intention to do work at time payments received—Whether credit obtained—"Credit"— "Liability"—Debtors Act, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 13 (1).

The appellant contracted with certain shopkeepers to erect or renovate electric signs. He obtained from each of them part of the agreed price in advance, but failed to carry out the work, or to return the money paid to him. He was convicted of obtaining credit by fraud, contrary to section 13 (1) of the Debtors Act, 1869,[1] the jury finding that at the time when he received the money he never intended to do the work.

On appeal, on the ground that he had committed no offence within the meaning of section 13 (1):—

Held, that the words "obtained credit" in section 13 (1) meant the incurring of a liability to pay, not only money, but money's worth, namely, services, and, in the circumstances, the appellant was rightly convicted of the offence charged.

Per curiam. Mere delay in paying a debt or doing work is not a criminal offence, and the section should not be abused by bringing proceedings under it where there is no real evidence of fraud, but merely of procrastination. The court's power to award costs against a prosecutor might usefully be borne in mind in that connexion.

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[1] Debtors Act, 1869, s. 13: "Any "person shall . . . be deemed guilty "of a misdemeanor, and on conviction "thereof shall be liable to be im- "prisoned for any time not exceeding "one year . . . (1) If in incurring any "debt or liability he has obtained "credit under false pretences, or by "means of any other fraud: . . ."

APPEAL against conviction.

The appellant, Charles Edward Ingram, was charged at Middlesex Quarter Sessions upon an indictment, eight counts of which charged him with obtaining credit by fraud contrary to section 13 (1) of the Debtors Act, 1869. The appellant was an electrician and the frauds alleged were that he had obtained contracts from a number of shopkeepers for the erection or renovation of electric neon signs on their premises for an agreed price. He obtained from the various shopkeepers part-payment of the price in advance, but, save for certain insignificant matters of a preparatory nature, he did not do the work. He was in financial difficulties and did not return the money which had been advanced to him.

The appellant was convicted on six counts of the indictment and sentenced to nine months' imprisonment on each count to run concurrently. He appealed against conviction, pursuant to a certificate granted to him by the deputy chairman, and contended that the facts proved at the trial disclosed no obtaining of credit on his part, and that accordingly his conviction was bad in law. On June 4 the Court of Criminal Appeal dismissed the appeal, but reserved its reasons for doing so.

C. W. R. Pickthorn for the appellant. The question is whether there is an obtaining of credit within the meaning of section 13 (1) of the Debtors Act, 1869, where there is no duty or promise to repay money at the time when goods or money is obtained, but there is a duty to supply goods or services. "Credit" can never be incurred unless a liability to pay money is involved. Here no such liability was incurred. The appellant's obligation was to supply goods and perform services. That is not an obtaining of "credit" within the meaning of section 13 (1). It was held in *Reg.* v. *Jones* [2] that to constitute an offence under the subsection there must be three elements: (1) the incurring of a debt or liability; (2) an obtaining of credit; and (3) fraud: see *per* Lord Russell of Killowen.[3] The meaning of "credit" was considered by Lord Coleridge C.J. in *Reg.* v. *Peters*,[4] where the definitions in Johnson's and Webster's dictionaries were referred to.[5] Johnson defines "credit" as being "correlative to a debt," and Webster as "trust, the transfer of goods in confidence of future payment." *Reg.* v. *Peters*[6] dealt with the question whether "credit" could be obtained within the meaning of section 31 of the Bankruptcy Act, 1883 (since replaced by section 155 of the Bankruptcy Act, 1914), where there had been no stipulation for credit in the contract between the parties; it was held that there was insufficient evidence of an obtaining of credit to go to the jury.

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[2] [1898] 1 Q.B. 119; 14 T.L.R. 79.

[3] [1898] 1 Q.B. 119, 124.

[4] (1886) 16 Q.B.D. 636; 2 T.L.R. 359.

[5] 16 Q.B.D. 636, 641.

[LORD GODDARD C.J. Webster defines "credit" as a trust. What is the difference in principle between handing goods to a person in the expectation of getting money and handing over money in the expectation of getting work done?]

It was held in *Reg.* v. *Hopkins and Ferguson*,[7] which concerned a charge under section 13 (2) of the Debtors Act, that a person could not be a "creditor" within the meaning of that subsection unless there was a liquidated debt. Attention is directed to the provisions of sections 154, 155 and 156 of the Bankruptcy Act, 1914. The wording of section 156 (*a*) is precisely the same as that of section 13 (1) of the Debtors Act, and it is submitted that any meaning attached to the word "credit" in that Act must be the same as in the Debtors Act. Section 13 (1) cannot apply where the duty is to do work.

[DONOVAN J. The starting point is what does "credit" mean? All the definitions cited begin with "trust or believe to do something at a future date." There is no mention anywhere of paying money.]

Section after section of the Debtors Act refers to "any sum." Before one can get credit one must become a debtor: *per* Lord Goddard C.J. in *Reg.* v. *Mitchell*,[8] where it was stated that to obtain credit under the Debtors Act there must be the creation of a debt. That case supports the proposition that there must be three elements to constitute the offence. In *Osborne* v. *Barton*[9] the defendant, an undischarged bankrupt, was charged with obtaining "credit" to the extent of £10 or upwards without disclosing that he was an undischarged bankrupt, contrary to section 155 (*a*) of the Bankruptcy Act, 1914. He had advertised that he had goods for sale, was sent a cheque with an order for the goods and failed to send the goods to the person who ordered them. It was held by the Divisional Court that he had not obtained credit and that the justices who dismissed the information were right to do so: see the judgment of Lord Goddard C.J.[10] It is not clear from the report whether the decision was based on the fact that no period of time for sending the goods was stipulated or because the goods were promised. On the authority of *Reg.* v. *Peters* [11] it could not be the former. It must follow that *Osborne* v. *Barton* [12] was decided the way it was because although the defendant did obtain £100, that was not credit.

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[6] 16 Q.B.D. 636.

[7] [1896] 1 Q.B. 652; 12 T.L.R. 346.

[8] [1955] 1 W.L.R. 1125, 1126; [1955] 3 All E.R. 263; 39 Cr.App.R. 49.

[9] (1950) 66 T.L.R. (Pt. 1) 115.

[DONOVAN J. In *Osborne* v. *Barton* [12] there was no credit because the buyers wanted the goods at once. It comes down to a question of degree and that is a matter for the jury. If I give you £100 and say "send me fireworks tomorrow," that is not credit, but if I say "here is £100; send me fireworks," and you say "I have none at the moment but will send you some on Guy "Fawkes' Day and will keep the money," that is credit.]

That was the view taken by Manisty J. in *Rex* v. *Peters*,[13] but that was a dissenting judgment.

[LORD GODDARD C.J. The difference between *Osborne* v. *Barton* [14] and the present case is that in *Osborne's* case [14] there was no finding that the defendant never intended to send the fireworks at all. Here the jury must have found that the appellant never intended to do the work when he obtained the money.]

The facts in *Rex* v. *Laker* [15] were precisely the same as in the present case. There the defendant obtained payment in advance for something which he was going to do, namely, supply an engine. If it is right that incurring a liability to deliver goods or do work is obtaining credit, then Laker did obtain credit, but it was held that he did not do so. It is not enough that there should be the incurring of a liability to do work. To obtain credit there must be a debt, and a debt means the owing of money. The appeal should be allowed.

J. H. Buzzard for the Crown. Section 13 (1) of the Debtors Act, 1869, refers to "incurring any debt or liability." If the meaning to be attributed to the words "obtained credit" in the subsection is that put forward by the appellant, the words "or "liability" are redundant and have no meaning. It is clear from the wording of the subsection that one must be able to obtain credit in circumstances where one is incurring a liability which is not a debt. The word "credit" is correlative to the word "liability." By section 3 of the Debtors Act, which was passed pari passu with the Bankruptcy Act, 1869, "words and expressions defined or explained in the Bankruptcy Act, 1869, shall "have the same meaning in this [the Debtors] Act." It is perfectly clear from section 31 of the Bankruptcy Act of 1869, where "liability" is defined, that a liability is an obligation or possibility of an obligation to pay money or money's worth on the breach of any contract or undertaking. That definition applies equally to "liability" when used in the Debtors Act. In the present case it is clear that the appellant, when he entered into these contracts, owed money's worth on the breach of the contracts. That is the kind of situation intended expressly to be covered by the Acts. It is clear from *In re Newman, Ex parte Capper* [16] that liability to perform work under a building contract is a liability within section 31 of the Bankruptcy Act. Equally, therefore, work not done must be a liability within section 13 (1) of the Debtors Act.

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[10] 66 T.L.R. (Pt. 1) 117.
[11] 16 Q.B.D. 636.
[12] 66 T.L.R. (Pt. 1) 115.
[13] 16 Q.B.D. 636.
[14] 66 T.L.R. (Pt. 1) 115.
[15] (1949) 34 Cr.App.R. 36.

[Lord Goddard C.J. Your argument is that a liability to give money's worth, i.e., to do work, has been incurred.]

Yes; as defined by the Debtors and the Bankruptcy Acts, the word "credit" is co-extensive with the word "liability." The meaning of "credit" as there defined is more extensive than the meaning of that word when used in ordinary language. Obtaining money on a promise to repay is obtaining credit within the meaning of the Acts: see *Carpenter's* case,[17] which is authority for the proposition that obtaining money on loan is obtaining credit under these Acts. See also *Rex* v. *Pryce*,[18] where *Coyne's* case [19] was distinguished on the basis that the defendant, who had obtained money from the parents of boy apprentices, was under no liability to repay the money. It follows that getting money on a promise to repay in the future is obtaining credit and incurring a debt. It equally follows that credit can be obtained by getting money on a promise to provide goods or services in the future. It is not a debt which is incurred but a liability. *Osborne* v. *Barton* [20] is distinguishable from the present case. There no time was stipulated for the supply of the goods and therefore there was no credit. It is abundantly plain from that case that the court had in mind that if in fact there had been an interval of time stipulated between the payment of the money and the supply of the goods there would have been an obtaining of credit. The definition given by Lord Goddard C.J.[21], namely, that "obtaining

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[16] (1876) 4 Ch.D. 724.
[17] (1911) 22 Cox C.C. 618.
[18] (1949) 34 Cr.App.R. 21.
[19] (1905) 69 J.P. 151.
[20] 66 T.L.R. (Pt. 1) 115.
[21] Ibid. 117.

"credit means obtaining something on a promise to do something "in the future" is adopted. [Reference was made to *Rex* v. *Laker*.[22]] In the indictment in the present case alternative counts of fraudulent conversion were laid because it seemed to be a borderline case whether the money had been advanced for buying materials or doing work, but the general proposition is that, assuming it is proved, as it was in the present case, that there is fraud ab initio, the offence committed is either fraudulent conversion or obtaining credit by fraud.

Pickthorn, in reply, referred to *Rex* v. *Pryce*.[23] The reason why the offence was not made out in *Coyne's* case [24] was because the money obtained was not returnable. If *Osborne* v. *Barton* [25] was decided on the basis that there was no time stipulated between payment and supply of goods, then it was not following *Reg*. v. *Peters*.[26] [Reference was also made to *Reg*. v. *Dent*.[27]]

LORD GODDARD C.J. The appeal will be dismissed, but as it is a case of considerable importance we will put our judgment into writing and give it at an early date.

June 8. LORD GODDARD C.J. Donovan J. will deliver the judgment of the court.

DONOVAN J. read the following judgment: The appellant is an electrician, and the fraud alleged against him was this: that he obtained contracts from a number of shopkeepers to erect or renovate electric neon signs at an agreed price. He obtained payment of part of that price in advance, but did not do the work save for insignificant matters of a preparatory nature. He was in financial difficulties, and none of the advance payments was returned.

The jury were properly directed that they could not convict the appellant unless they were satisfied, inter alia, that in obtaining these advance payments and then failing to do the work he was acting fraudulently, that is to say, that he never had any intention to do the stipulated work at the time he received payments in advance. The jury, influenced no doubt by what appeared to be a systematic course of conduct on the appellant's part, convicted him, and it must accordingly be taken that they found that when he received part payments at the outset he had no intention to do the work which he had undertaken to do. On any view, therefore, his conduct was fraudulent, but he argues that it involved no obtaining of credit and thus no offence under section 13 (1).

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[22] 34 Cr.App.R. 36.

[23] 34 Cr.App.R. 21.

[24] 69 J.P. 151.

[25] 66 T.L.R. (Pt. 1) 115.

[26] 16 Q.B.D. 636.

[27] [1955] 2 Q.B. 590; [1955] 2 All E.R. 806; 39 Cr.App.R. 131.

The requisites for an offence under that section are these: First, that the accused person has obtained credit. Second, that he obtained it under false pretences or by means of any other fraud. Third, that he obtained it in incurring any debt or liability. The appellant admits that he incurred a liability in these transactions, namely, a liability to do the work. He argues, however, that when he received the various payments in advance he obtained no credit, for what he had to do in return was not to pay money in the future, but to do work. In other words, there can be no obtaining of credit, he says, unless the obligation towards the person who had given credit is to pay him money in the future. It is not sufficient if the obligation is to pay him money's worth only, either in the shape of goods or services.

Considerable light is thrown upon the problem by the statutory definition of the word "liability" in section 13 (1). That definition comes in the first place from section 3 of the same Act, where it is provided that ". . . words and expressions "defined . . . in the Bankruptcy Act, 1869, shall have the "same meaning in this Act."

By section 31 of the Bankruptcy Act, 1869, the word "liability" is defined. It is to include any compensation for work or labour done and any obligation or possibility of obligation to pay money or money's worth on a breach of contract: and, generally, "any express or implied engagement, agreement, or "undertaking, to pay, or capable of resulting in the payment of "money or money's worth, whether such payment be as respects "amount fixed or unliquidated; as respects time present or "future, certain, or dependent on any one contingency or on "two or more contingencies; . . ."

The Bankruptcy Act, 1869, was repealed by the Bankruptcy Act, 1883, which in turn was repealed by the Bankruptcy Act, 1914, with certain immaterial exceptions. But the aforesaid definition of "liability" for the purpose of the Debtors Act, 1869, has been preserved, first by sections 149 (2) and 37 (8) of the 1883 Act, and now by sections 150 (2) and 30 of the Act of 1914, which was a consolidating measure.

It therefore follows that when section 13 (1) of the Debtors Act, 1869, speaks of credit obtained in incurring any debt or liability, it covers the case where credit is obtained in incurring any liability to pay not only money but money's worth. "Money's worth" may consist of commodities or services, and accordingly if credit is obtained in incurring a liability to pay in money's worth, the case is within the express provisions of section 13 having regard to the statutory definition above set out. It is, therefore, erroneous to argue that credit can be obtained within the meaning of the section only if the debt or liability incurred is to pay money and money alone. The one answer suggested on behalf of the appellant is that the word "liability" in section 13 (1) refers to a debt payable in money in the future. Apart from any other defects it may have, this argument entirely ignores the expression "money's worth" in the statutory definition of the word.

In the present case the appellant received cash in advance. The liability he incurred was to render money's worth, that is, services in the near future to the customer who paid him the cash. In the meantime the customer trusted him to do the work. On these facts it is clear that he received credit, and did so in incurring a liability within the meaning which the court has to give to that word. He obtained such credit by fraud, and thus the offence under section 13 is complete.

A number of authorities were referred to in the argument, but none of them was concerned with the same point, namely, whether credit can be obtained within the meaning of section 13 (1) when the correlative obligation is to pay in money's worth. It is not necessary, therefore, to discuss them, though it may be observed in passing that *Reg.* v. *Jones*,[1] where the accused obtained a meal in a restaurant with no means to pay for it, is, in many respects, the converse of the present case.

One final observation of a general character may be added. The present case was, on the evidence, a clear case of fraud. Mere delay in paying a debt or doing work, however, is not a criminal offence, and courts who try these cases will no doubt be on their guard against any attempt to abuse the section by bringing proceedings under it where there is no real evidence of fraud, but merely of procrastination. The court's power to award costs against a prosecutor may usefully be borne in mind in this connexion.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

E. M. W.

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[1] [1898] 1 Q.B. 119; 14 T.L.R. 79.

C. C. A.

1956
Apr. 23, 30.

Lord Goddard C.J., Cassels and Donovan JJ.

REGINA *v.* CAMPBELL.

Criminal Law—Evidence—Child, by—Corroboration—Indecent assaults on children—Whether children, assaulted or not, can give corroborative evidence of assaults on other children.

A schoolteacher was convicted on an indictment containing seven counts, each alleging an indecent assault on one of seven different boys. In some counts, corroborative evidence was given by boy complainants referred to in other counts, and in four counts there was corroborative evidence given by children not involved in any of the charges. All the children gave evidence on oath:—

Held, that the sworn evidence of a child could be corroborated by the evidence of another child, whether such evidence was given on oath or not, and it made no difference that the child called to corroborate the evidence of an assaulted child was himself alleged to be the victim of an assault in another count of the same indictment.

Observations on sworn and unsworn evidence by children and the appropriate warnings to be given to juries in such cases.

Rex v. *Mitchell* (1952) 36 Cr.App.R. 79 considered.

Rex v. *Dent* (1943) 29 Cr.App.R. 120; [1943] 2 All E.R. 596 explained.

Appeal against conviction.

The appellant, Forbes McArthur Campbell, a schoolteacher, was charged at Middlesex Quarter Sessions on an indictment containing seven counts, each alleging an indecent assault on one of seven different boys under the age of 16. All the children involved were pupils in the appellant's class. The seven boys alleged to have been assaulted all gave evidence. In some cases one boy gave evidence in corroboration of the evidence of another. In four counts, three other children not involved in any of the charges gave corroborative evidence. All the children gave evidence on oath. The appellant was convicted on all counts.

The chairman gave a certificate for appeal as follows: "The "defendant having raised the question whether the evidence of "other children than those with regard to whom offences were "being alleged could afford corroboration of the evidence of "complaining children (that question having been specifically "left open in *Rex* v. *Mitchell* [1]), and whether the summing-up "with regard to that evidence was adequate and proper."

Michael Havers for the appellant. This appeal raises two points: (1) Can one child who has himself been tampered with corroborate the evidence of another child who says that he too has been assaulted? (2) Can another child who himself has not been tampered with corroborate the evidence of a child who has been tampered with? If the law is that an assaulted child cannot give corroborative evidence, then a child who has not been tampered with should be in the same position. [Reference was made to *Rex* v. *Bailey.*[2]]

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[1] (1952) 36 Cr.App.R. 79.

Rex v. *Gregg*[3] is an authority directly contrary to the appellant's contentions. Courts have hardened in their view on corroboration since 1932 and *Gregg*[3] was based solely on the statute (Children Act, 1908, s. 30). It does not appear to have been argued in that case whether the little girl could have given corroborative evidence but rather to have been accepted. The contrary has been accepted in other cases. *Rex* v. *Dent*[4] is a case directly in point and supports the appellant's contentions. There the court treated the evidence of young girls as not amounting to corroboration. [Reference was made to *Rex* v. *Mitchell.*[5]]

[LORD GODDARD C.J. referred to *Rex* v. *Hall*[6]; *Noor Mohamed* v. *Rex*[7]; *Rex* v. *Sims*,[8] and *Harris* v. *Director of Public Prosecutions.*[9]]

With regard to the summing-up in the present case it is conceded that the jury were given repeated warnings as to corroboration, but nevertheless in view of *Dent*[10] the appeal could be allowed.

[LORD GODDARD C.J. But can you rely on *Dent*[10] as laying down any principle when Hallett J., in delivering judgment, said[11]: "We desire to make it plain that, in taking, as we propose to take, a very exceptional course, we do so because we "regard this as a very exceptional case, and not because we "regard ourselves as initiating or applying any fresh principle."]

The exceptional course in that case was the quashing by the Court of Criminal Appeal of a conviction even though the proper warning of the danger of convicting in the absence of corroboration was given by the trial judge. The matter comes back to the reason why this rule exists, and it is clearly because of the danger of a child making up something. When one looks at all

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[2] [1924] 2 K.B. 300; 18 Cr.App.R. 42.

[3] (1932) 24 Cr.App.R. 13.

[4] (1943) 29 Cr.App.R. 120; [1943] 2 All E.R. 596.

[5] 36 Cr.App.R. 79.

[6] [1952] 1 K.B. 302; [1951] 2 T.L.R. 1264; 35 Cr.App.R. 167; [1952] 1 All E.R. 66.

[7] [1949] A.C. 182; 65 T.L.R. 134; [1949] 1 All E.R. 365.

[8] [1946] K.B. 531; 62 T.L.R. 431; 31 Cr.App.R. 158; [1946] 1 All E.R. 697.

[9] [1952] A.C. 694; [1952] 1 T.L.R. 1075; 36 Cr.App.R. 39; [1952] 1 All E.R. 1044.

[10] 29 Cr.App.R. 120.

[11] Ibid. 123.

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the cases it appears quite clear that a child who has been tampered with cannot corroborate. The question whether a child who has not been tampered with can corroborate has up to now been left open, but the rule must be the same.

F. H. Lawton for the Crown. The fundamental principle is that a jury must give their verdict in accordance with the evidence. Corroboration merely means evidence which tends to strengthen other evidence in the case. When that is borne in mind it clears away some of the difficulties. One has to ask whether, in respect of each count, there is independent evidence tending to connect the appellant with the crime: *Rex* v. *Baskerville.*[12] Was the evidence of tainted boys evidence vis-à-vis particular boys in particular counts? A fortiori the evidence of boys who have not been tampered with must be independent evidence. The problem in this case is as to the meaning of independent. Independent of what and of whom? Independent means independent of the boy who is the subject-matter of the charge. In Kenny's Outlines of Criminal Law, 16th ed., para. 600, p. 420, it is pointed out that children are an untrustworthy class of witnesses.

[LORD GODDARD C.J. There the author is dealing with unsworn evidence. An accused cannot be convicted on unsworn evidence alone; there has to be corroboration.]

The fact that it was considered necessary to provide by statute (section 38 of the Children and Young Persons Act, 1933) that an accused could not be convicted unless unsworn evidence is corroborated rather indicates that corroboration was unnecessary at common law.

Cur. adv. vult.

April 30. LORD GODDARD C.J. read the following judgment of the court.

The appellant was convicted at Middlesex Quarter Sessions on an indictment containing seven counts each charging him with indecent assaults on boys under the age of 16, each of whom was about 10 years old. The appellant was a schoolmaster and the case against him was that he on various occasions sat beside the boys while they were doing their lessons and felt their private parts. The court allowed the boys to be sworn. The chairman, in summing up, stressed more than once how important it was that there should be corroboration of the evidence of young boys and gave a strong warning on this subject, at the same time telling the jury that if they fully appreciated the danger of convicting on the uncorroborated evidence of a child they could convict if absolutely certain that they were right in doing so. The evidence relied on by the prosecution as corroboration was twofold; in some cases a boy named as the assaulted person in a count of the indictment gave evidence that he saw the defendant commit a similar or substantially similar act to that of which he complained on another boy named in another count. In four cases there was evidence of two boys and one girl who were not involved in any of the charges that they had seen the defendant act in relation to some of the boys in a manner which was alleged to constitute an indecent assault. The jury were specifically directed that they must consider each case separately and after this direction and the warning we have already mentioned the jury convicted on all counts. The chairman gave a certificate for appeal in these terms: "The defendant having "raised the question whether the evidence of other children "than those with regard to whom offences were being alleged "could afford corroboration of the evidence of complaining "children (that question having been specifically left open in "*Rex* v. *Mitchell*[1]), and whether the summing-up with regard "to that evidence was adequate and proper."

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[12] [1916] 2 K.B. 658, 667; 12 Cr.App.R. 81.

The main argument before us on the appeal was that as courts have always warned juries of the danger of convicting on the uncorroborated evidence of a child of tender years, the evidence of such a child could not amount to corroboration unless his or her evidence was also corroborated. From this, if accepted, it would seem to follow that a child's evidence would never corroborate, for if the evidence of the corroborating child had in turn to be corroborated by a person of more mature years it would follow that it would be the latter's evidence that affords corroboration. If, when child A says: "I saw the defendant "assault child B," A has to be corroborated, someone would have to be called to say: "I saw what A says he saw," so there would be no point in calling A.

Now in dealing with this matter it has to be remembered that for the present purpose child witnesses must be divided into two classes, those who are too young to be sworn and those who in the opinion of the court are capable of understanding the obligation of an oath. By section 38 of the Children and Young Persons Act, 1933, a child of tender years may give unsworn evidence in any proceedings against any person for any offence,

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[1] (1952) 36 Cr.App.R. 79.

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but the person accused cannot be convicted unless the unsworn evidence is corroborated by some other material evidence in support thereof implicating him. The unsworn evidence cannot be corroborated by other unsworn evidence: *Rex* v. *Manser.*[2] It will be observed that there is no definition in the Act of what is meant by "a child of tender years" though "child" is defined as a person under the age of 14. Whether a child is of tender years is a matter for the good sense of the court, and though it may be difficult to decide whether a child understands the obligation of an oath, a court probably would have no difficulty in deciding whether he or she was of tender years. Where, then, such a child gives unsworn evidence, it must be corroborated by some other evidence, and we can see no reason why the corroboration should not be the evidence of another child who in the opinion of the court is capable of being sworn. Why, then, when a child gives sworn evidence which is not required by statute to be corroborated should the corroboration not be that of another child? It is true that for very many years the courts have always warned juries that it is dangerous to convict on the uncorroborated evidence of a child, whether of tender years or not, but so also is a similar warning given in all sexual cases. In a case where the complaining party is a grown woman the jury would be advised to look for corroboration and if the evidence is that of a child, that is, of one under the age of 14, but who in the opinion of the court can be sworn, we can find no reason for saying that such evidence could not be accepted by the jury as corroboration. To hold otherwise would mean that if a mother was indecently assaulted in the presence of her son, aged, say, 12 or 13, his evidence could not be accepted as corroboration if the jury believed him. Whether evidence that is legally admissible does corroborate is for a jury to determine. The court points out to them what can be corroboration, and then it is for the jury to decide whether it does corroborate and it is open to them to accept it or to reject it, it may be because they do not think it safe to act upon the evidence of one so young.

It is no doubt also desirable to remind the jury that the evidence of a child, not only of one in respect of whom the charge is made, but of one called to corroborate, needs to be looked at with care, but that the jury may accept it as corroboration we think is not open to doubt. Nor can we see that it makes any difference as regards admissibility that the child offered as a corroborating witness of the evidence of another is also alleged in the indictment to be an assaulted person. Each count in an indictment is equivalent to a separate indictment. Suppose, then, separate trials are ordered of counts in an indictment alleging in count 1 an assault on child A and in count 2 one on child B. The latter, provided he is sworn, could be tendered to corroborate the evidence of A and need not and, indeed, could not be asked any questions in chief as to the assault on him. In our opinion, therefore, it makes no difference whether the child called to corroborate the evidence of another is alleged to be the victim in another count of the indictment or not, though if he is, no doubt it would be wise to warn a jury that they should bear this in mind and look with particular care on that evidence.

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[2] (1934) 25 Cr.App.R. 18.

Perhaps we should say a word about the cases to which counsel on either side called our attention. It is agreed that there is no case directly in point and both counsel cited the same cases. In *Rex* v. *Bailey* [3] the actual decision was that the jury must return a verdict on each count in the indictment and should be warned against supplementing evidence on any one by evidence on any other, but the court did emphasize the desirability of warning the jury that they should regard the evidence of boys in these cases of indecency with great care. In *Rex* v. *Gregg* [4] the court pointed out that where unsworn evidence is given the judge ought to draw the attention of the jury to the fact that the statute requires that evidence to be corroborated, because the jury ought to approach the question of corroboration more carefully if they know that it is required by an express statutory provision and not merely by the ordinary rule of common sense and fairness which makes it desirable that the evidence of young persons should be corroborated. The oft-cited case of *Rex* v. *Dent* [5] in fact lays down no particular principle. It was a case in which the judge had given a proper warning as to the danger of convicting without corroboration, but the jury had none the less convicted. On a review of the evidence the court thought that the verdict was unreasonable and accordingly exercised the power given by the Criminal Appeal Act, 1907, of quashing the conviction. In *Rex* v. *Mitchell*,[6] the case referred to by the chairman in the certificate which he granted, the question which seems to have been left open is whether the jury should always be warned of the danger of accepting the evidence of a child of tender years in the absence of corroboration although the child is not giving evidence in regard to an assault on himself or herself. It will be remembered that in that case the court was not dealing with the unsworn evidence of a child, but in stating the question that was left open we think the court must have been referring to unsworn evidence as they specifically mention the evidence of a child of tender years. We, therefore, have to consider the case of a child of tender years being called to give unsworn evidence in regard to an offence committed against some other person or against property. Inasmuch as the statute which permits a child of tender years to give unsworn evidence expressly provides for such evidence being given in any proceeding against any person for any offence, it appears to us that the unsworn evidence of a child can be given to corroborate the evidence of another person given on oath. At the same time it would be obvious that a jury should be warned that such evidence must be regarded with great care, but in view of the terms of the section it seems to us that the evidence is admissible, but its weight is for the jury.

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[3] [1924] 2 K.B. 300; 18 Cr.App.R. 42.

[4] (1932) 24 Cr.App.R. 13.

[5] (1943) 29 Cr.App.R. 120; [1943] 2 All E.R. 596.

[6] 36 Cr.App.R. 79.

To sum up, the unsworn evidence of a child must be corroborated by sworn evidence; if, then, the only evidence implicating the accused is that of unsworn children the judge must stop the case. It makes no difference whether the child's evidence relates to an assault on himself or herself or to any other charge, for example, where an unsworn child says that he saw the accused person steal an article. The sworn evidence of a child need not as a matter of law be corroborated, but a jury should be warned, not that they must find corroboration, but that there is a risk in acting on the uncorroborated evidence of young boys or girls, though they may do so if convinced that the witness is telling the truth, and this warning should also be given where a young boy or girl is called to corroborate the evidence either of another child, sworn or unsworn, or of an adult. The evidence of an unsworn child can amount to corroboration of sworn evidence though a particularly careful warning should in that case be given. As proper warnings were given by the chairman in this case there is no ground on which we can interfere with the conviction.

As we are endeavouring in this judgment to deal comprehensively with the evidence of children, we may perhaps endeavour to give some guidance to courts who have from time to time to deal with cases of sexual assaults on children where the evidence of each child deals only with the assault on himself or herself. In such cases it is right to tell a jury that because A says that the

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accused assaulted him, it is no corroboration of his evidence that B says that he also was the victim of a similar assault though both say it on oath. At the same time we think a jury may be told that a succession of these cases may help them to determine the truth of the matter provided they are satisfied that there is no collaboration between the children to put up a false story. And if the defence is one of innocent association by the accused with the children, *Rex* v. *Sims*,[7] subsequently approved on this point by the House of Lords in *Harris* v. *Director of Public Prosecutions*,[8] shows that such evidence can be given to rebut the defence.

This appeal is accordingly dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

C. J. E.

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[7] [1946] K.B. 531; 62 T.L.R. 431; 31 Cr.App.R. 158; [1946] 1 All E.R. 697.

[8] [1952] A.C. 694; [1952] 1 T.L.R. 1075; 36 Cr.App.R. 39; [1952] 1 All E.R. 1044.

FAIREY *v.* SOUTHAMPTON COUNTY COUNCIL.

1956
Jan. 24.

Lord Goddard C.J., Hilbery and Stable JJ.

C. A.

1956
May 14, 15; *June* 19.

Denning, Birkett and Parker L.JJ.

Highway—Right of way—Footpath over private land—Uninterrupted user by public for more than 20 years—Owner's objection to use by public other than local residents in 1931*—No intention to dedicate thereafter—Whether right to use land "brought into question"—Effect of Rights of Way Act,* 1932*—Whether retrospective—Rights of Way Act,* 1932 (22 *&* 23 *Geo.* 5, *c.* 45), *ss.* 1, 2.

Statute—Retroactive effect—Procedural Act—Act giving right of prescription—Not procedural—Whether retrospective as to end of period of user—Intention of Act—Rights of Way Act, 1932.

In 1954 a landowner applied to quarter sessions for a declaration that no right of way existed over a path on his land shown as a public path on a map prepared by the local authority. Quarter sessions found that the path had been used by the public without interruption or objection from 1885 to 1931, though there was no sufficient evidence on which an intention to dedicate or not to dedicate could be presumed at common law; that on an occasion in 1931 the then owner had objected to the use of the path by the public other than local residents; and that thereafter he and the present landowner successively had turned such persons off the path and by so doing had shown an intention not to dedicate the path as a highway; but they determined that a public right of way was deemed to have been dedicated by section 1 of the Rights of Way Act, 1932,[1] and dismissed the application.

The landlord appealed to the Divisional Court, which held (1) that the right of the public to use the land was "brought into "question" within the meaning of section 1 (6) of the Rights of Way Act, 1932,[1] when a landlord for the first time refused to allow the public to use a way which they had been using without interruption for over 20 years, and that it was not necessary, to bring the case within the Act, for the member of the public whose right was questioned, to insist that he had a right of way; and (2) (Stable J. dissenting) that the Act of 1932 was a procedural Act which took effect retrospectively and it was no objection that the period of 20 years after which the public was deemed to have acquired a right terminated before the Act came into force. On appeal by the landowner:—

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[1] Rights of Way Act, 1932, s. 1: "(1) Where a way, not being of "such a character that user thereof "by the public could not give rise at "common law to any presumption of "dedication, upon or over any land "has been actually enjoyed by the "public as of right and without inter-"ruption for a full period of twenty "years, such way shall be deemed to "have been dedicated as a highway "unless there is sufficient evidence "that there was no intention during "that period to dedicate such way, . . .

"(3) A notice by the owner of the "land over which any such way "passes inconsistent with the dedica-"tion of the way as a highway, "placed before or after and main-"tained after the commencement of "this Act in such a manner as to be "visible to those using the way, "shall, in the absence of proof of a "contrary intention, be sufficient evi-"dence to negative the intention to "dedicate such way as a highway, "and where a notice has been placed "in the manner provided in this sub-"section and is subsequently torn "down or defaced, notice in writing "by the owner of the land to the "council of the county and of the "borough or urban or rural district "council in which the way is situate "that the way is not dedicated to the "public shall, in the absence of "proof of a contrary intention, be "sufficient evidence to negative the "intention of the owner of the land to "dedicate such way as a highway.

"(5) In the case of land in the "possession of a tenant for a term "of years or from year to year let on "lease, any person for the time being "entitled in reversion to the land "shall, notwithstanding the existence "of any such tenancy, have the right "to place and maintain such notice "as aforesaid, but so that no injury "is done thereby to the business or "occupation of the tenant.

"(6) Each of the respective periods "of years mentioned in this section "shall be deemed and taken to be "the period next before the time "when the right of the public to use "a way shall have been brought "into question by notice as aforesaid "or otherwise."

S. 2: "(1) Nothing in this Act "shall affect any proceedings pending "at the commencement of this Act, "and where in respect of any way "a court of competent jurisdiction "decides in proceedings so pending, "or has before the commencement of "this Act decided, that the way is "not a highway, this Act shall not "apply except as respects enjoyment "of the way after the date of the deci-"sion. (2) Nothing in this Act shall "operate to prevent the dedication of "a way as a highway being pre-"sumed on proof of user for any less "period than twenty years or to pre-"vent the dedication of a way as a "highway being presumed or proved "under any circumstances under "which it can be presumed or "proved at the time of the passing "of this Act."

S. 4: "The person entitled to the "remainder or reversion immediately "expectant upon the determination "of a tenancy for life or pour autre "vie in land shall have the like "remedies by action for trespass or "an injunction to prevent the acquisi-"tion by the public of a right of way "over such land as if he were in "possession thereof."

Held, (1) that the landowner, by taking steps in 1931 to stop the public using the way, had "brought into question" their right to use it within the meaning of section 1 (6) of the Act of 1932.

Per Denning L.J. For the right of the public to be "brought "into question" the landowner must challenge it by some means sufficient to bring it home to the public that he is challenging their right to use a way, so that they may be apprised of the challenge and have a reasonable opportunity of meeting it. Further, to prove that he had no intention to dedicate a way, there must be evidence of some overt acts on his part such as to show the public who used the way—here, the local residents—that he had no such intention.

(2) That the Act of 1932, like the Prescription Act, 1832, was not merely procedural, for it affected the substantive law by giving and defining rights; but that the Act by its terms was clearly intended to operate retrospectively; and that, since 20 years' enjoyment of the way had been had as of right by the public before 1931, it was by section 1 (1) of the Act a highway, although the Act came into operation only in 1934.

Cooper v. *Hubbuck* (1862) 12 C.B.N.S. 456 and *Jones* v. *Bates*, 54 T.L.R. 648; [1938] 2 All E.R. 237 considered.

Decision in *Attorney-General and Newton Abbot Rural District Council* v. *Dyer* [1947] Ch. 67; 62 T.L.R. 632; [1946] 2 All E.R. 252 approved.

Decision of Divisional Court affirmed in the result.

CASE STATED by appeals committee of Hampshire Quarter Sessions.

On December 29, 1954, application was made by the appellant, Sir Richard Fairey, pursuant to section 31 of the National Parks and Access to the Countryside Act, 1949, for a declaration that on May 11, 1953, no public right of way existed over a path at Bossington in the County of Southampton delineated on a provisional map prepared by the respondents, the Southampton County Council, pursuant to section 30 of the Act.

The appeals committee heard the application on May 3 and 4, 1955, and found the following facts: On May 11, 1953, the council prepared a draft map pursuant to section 27 of the Act and on November 13, 1953, the landowner objected to the inclusion therein of the path in question. After his objection had been heard the council prepared the provisional map. The path in question began at a point in the public highway opposite Bossington farm and terminated at a stile on the boundary between lands owned by the landowner and lands of the British Transport Commission adjacent to Horsebridge station. Further paths gave access from the stile to Horsebridge station and through it to the public highway. Throughout living memory the lands over which the path ran had belonged to the owner for the time being of Bossington House. In 1885 the estate belonged to one Deverell and in or about 1931 it descended to John Deverell. In 1937 the appellant purchased the estate and remained the owner and occupier thereof. The path existed as a farm convenience prior to the construction of the railway in 1860. Since 1885 the path had been used by members of the public without interruption both (i) to obtain access to Horsebridge station and Horsebridge village and beyond, and to places beyond the western end of the path or vice versa and (ii) for the purposes of recreation, such as, for example, a circular walk from Houghton in the evenings through the meadows and round by the highways. Some of the persons so using the path were strangers to the locality but many were known to the owner for the time being either as his tenants or his employees or as neighbouring residents. (Persons in the last three categories are hereinafter referred to as "local residents.") In so far as the path was used for recreation it was so used mainly by such local residents; user in category (i) above was more frequent by local residents than by strangers to the locality. Between 1885 and 1931 the public use of the path was nec vi nec clam nec precario nor was it interrupted, and during that period the owners for the time being of the land raised no objection to the use of the path by the persons and in the manner referred to above; nevertheless quarter sessions were not satisfied, on the evidence before them, that an intention to dedicate on the part of such owners could be presumed at common law nor had they sufficient evidence of an intention on the owners' part before 1931 not to dedicate the path as a public highway.

On an occasion in 1931 the then owner, John Deverell, had objected to the use of the path by the public other than local residents. From 1931 until 1937 John Deverell, and at all material times since 1937 the appellant, made no attempt to prevent local residents from using the path, but if any other member of the public was seen thereon by either of them he was told that he had no right to be there. Both thereby showed an intention not to dedicate the path as a highway for the use of members of the public at large. There was no evidence that any member of the public questioned the right of either John Deverell or the appellant thus to prevent the use of the path.

It was contended by the appellant that a public right of way over the path should not be deemed to have been dedicated under section 1 of the Rights of Way Act, 1932,[1] in that (a) the right was not brought into question within the meaning of section 1 (6) of the Act until 1953 when the appellant objected to the inclusion of the path in the map prepared by the respondents; and (b) that during the period of 20 years immediately preceding 1953 the owners of the land for the time being had shown an intention not to dedicate.

It was contended by the respondents (a) that the right of the public to use the path was brought into question by John Deverell in 1931 when he told users other than local residents that they had no right to use the path; (b) that during a period of more than 20 years immediately before the time in 1931 when the public right to use the path was brought into question (i) the public at large had used the path as of right and without interruption, and (ii) that there was no sufficient evidence that there was no intention to dedicate the path as a highway; (c) that therefore the path must in accordance with section 1 of the Rights of Way Act, 1932, be deemed to have been dedicated as a highway.

The appeals committee were of opinion that the period of 20 years referred to in section 1 (6) of the Rights of Way Act, 1932, meant, on the facts, the period immediately before the first occasion in 1931 when it was proved to their satisfaction that the owner for the time being had objected to the use of the path by persons who were not local residents. They accordingly determined that a public right of way was deemed to have been dedicated by virtue of section 1 and dismissed the application.

The landowner appealed.

Percy Lamb Q.C. and *J. P. Widgery* for the appellant. Two questions arise in this appeal: (1) What is the meaning of the words " brought into question " in section 1 (6) of the Rights of Way Act, 1932? (2) Does the Act take effect retrospectively? On the first question it is submitted that on the phraseology of section 1 (6) of the Act, and on the facts found, the right of the public to use the way was not brought into question in 1931 and quarter sessions were wrong in so holding. The words " brought "into question" connote two parties, and therefore a mere statement by a landowner that a way over his land is not a right of way is not sufficient to bring the right of the public to use the way into question within the meaning of section 1 (6) of the Act. [Reference was made to the Prescription Act, 1832.]

The case finds that from 1885 to 1931 the pathway in question was used by the public without objection, but quarter sessions were unable to make the common law presumption of dedication and therefore there was no common law highway in existence. In 1931 and thereafter John Deverell, the then owner, and subsequently the appellant, showed an intention not to dedicate the pathway, and there was no evidence that any member of the public ever questioned their right to prevent him from using the pathway. Yet quarter sessions decided that the right of the public to use the pathway had been brought into question in 1931 when John Deverell prevented the public from using the path and that a statutory highway was thereby created. Quarter sessions were wrong in so holding.

[HILBERY J. "Notice as aforesaid" in section 1 (6) may bring the right of the public into question. A notice does not connote two parties.]

If a notice is put up by a landowner denying the public the use of the path and nobody asserts a contrary right, then the public right is not brought into question. Until there is evidence before the court of one party asserting a right and another party asserting the contrary, the right of the public cannot be brought into question. All that John Deverell did in 1931 was to assert his right and that assertion was not questioned by any member of the public. On the facts found here, the only time that the public right to use the path was brought into question was in 1953 when the new right of way was claimed by the county council and included in the map prepared by them pursuant to section 30 of the National Parks and Access to the Countryside Act, 1949, and the appellant gave notice of objection.

[LORD GODDARD C.J. If the public had been using the pathway for 20 years and the owner then said that there was no right of way, that is bringing the public right into question.]

If this first argument is wrong, then it is submitted that the Act is not retrospective so as to cover a period of 20 years which began and determined before the Act came into force. The decision in *Attorney-General and Newton Abbot Rural District*

Council v. *Dyer*[2] is erroneous. Although the 20-year period can commence at any time, it must determine after the Act came into force, that is to say, after January 1, 1934. A landowner ought not to be affected by an Act which is not expressed to be retrospective.

[LORD GODDARD C.J. referred to the Prescription Act, 1832.]

I know of no case under that Act where it has been held that the period of user could commence and determine before the Act came into force. It is contrary to all the canons of construction to hold that the Act of 1932 is retrospective. In *Attorney-General and Newton Abbot Rural District Council* v. *Dyer*[2] Evershed J. over-simplified the Act in holding that it was substantially a procedural Act which was not intended to create new rights. It does create new rights in the sense that it affects the rights of the public and of landowners. The Act may be in part procedural, but it is not wholly so. An Act which is in part procedural but which in part creates or destroys rights ought not to be construed retrospectively unless that is expressly so stated: see Maxwell on Interpretation of Statutes, 10th ed., p. 113. The general statement of the law by Sargant J. in *In re Hale's Patent*[3] is applicable here.

Finally, section 2 (1) of the Act supports the submission, as the insertion of that subsection clearly shows that the Act is to affect matters arising only after the date when the Act came into operation, namely, on January 1, 1934. The appeal should be allowed.

J. Scott Henderson Q.C. and *M. G. Polson* for the county council. On the first point raised in the appeal, the starting point of the Act is that the public must have been using the way as of right for a period of 20 years. If that is proved, then section 1 (6) comes into play. By the terms of that subsection any notice which satisfies the requirements of section 1 (3), which deals with notice, will bring the right of the public to use the way into question, so that the right may be questioned by a "Private" notice, or "Trespassers will be Prosecuted," each of which satisfies the terms of section 1 (3). But the public right may be brought into question in an infinite number of other ways.

[He was stopped.]

As to the second point, the right of the public to use the way can be questioned at any time. Reliance is placed on section 1 (6) of the Act.

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[2] [1947] Ch. 67; 62 T.L.R. 632; [1946] 2 All E.R. 252.

[3] [1920] 2 Ch. 377, 386; 36 T.L.R. 832.

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[STABLE J. If the words "right of the public" are construed as being a right conferred by the Act of 1932, then it could not have come into being in 1931.]

It over-simplifies the position to say that the Act conferred a new right. Its purpose was to give members of the public a right to continue in the enjoyment of a right which they had hitherto enjoyed: see *Jones* v. *Bates*, *per* Scott L.J.[4] It is an Act which enables the public to prove their right. On the facts found in the present case, members of the public, at least so far as local inhabitants were concerned, continued to use this way at all times. Section 1 (6) and section 1 (3) when read in conjunction are clear enough to indicate that their right of user could be questioned at any time by any act on the part of the owner which showed an intention not to dedicate, for example, by closing the way, by posting a notice, by bringing an action for trespass against a member of the public, or by stopping the public from using the path, as John Deverell did in 1931. Those are all acts which bring the right of the public to use the path into question and they may be done at any time. [Reference was made to section 4 of the Prescription Act, 1832.]

As to the effect of section 2 (1), the purpose of its insertion was to give a landowner an opportunity to take legal proceedings between the date when the Act was passed and the date when it came into force, so that the court might determine whether a right of way existed or not. In the present case the appellant did not take legal proceedings and he cannot rely on section 2 (1).

[STABLE J. It is an extraordinary position that a man who starts litigation retains his rights but that he who does not loses them.]

That is implicit in the policy of the Act.

[HILBERY J. Section 2 (1) tacitly recognizes that the arbitrary rules laid down by the Act affect the rights of landowners retrospectively and therefore gives them a right to take proceedings to prove whether the ways in question are rights of way or not.]

[Reference was made to *Merstham Manor Ltd.* v. *Coulsdon and Purley Urban District Council*.[5]]

Percy Lamb Q.C., in reply, referred to *Attorney-General* v. *Antrobus*.[6]

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[4] [1938] 2 All E.R. 237, 244; 54 T.L.R. 648.

[5] [1937] 2 K.B. 77; 52 T.L.R. 516; [1936] 2 All E.R. 423.

[6] [1905] 2 Ch. 188; 21 T.L.R. 471.

LORD GODDARD C.J. This is a case stated by the quarter sessions for the county of Southampton, to whom the appellant applied for a declaration that on May 11, 1953, no public right of way existed over a path at Bossington in the County of Southampton, which path was delineated upon a provisional map prepared by the respondents pursuant to section 30 of the National Parks and Access to the Countryside Act, 1949.

It is unnecessary to say more than that under the Act the county council have to prepare a map on which is shown what they consider to be the rights of way, and the landowner, or any other person aggrieved, can object and say that a path or road shown on the map as a public right of way is not a public right of way. If the county council do not accept the objector's contention the matter goes to quarter sessions. [His Lordship stated the facts and continued:] I say in passing, because the question does not arise immediately in the present case, that "local residents," even limited in the way that quarter sessions have said that it was understood, that is, to "tenants, employees "and neighbouring residents," is a very wide term and it might some day have to be decided whether, if people in so large a category were allowed to use the path without interruption, that was not a user by the public.

I now turn to the Act. [His Lordship read section 1 (1), (3) and (6) of the Rights of Way Act, 1932, and continued:] For the purposes of the first matter which we have to consider in the case, those are all the provisions of the Act which need be mentioned. The justices have found that it was not until after 1931 that an attempt was made by the then owner of the land to prevent persons using the land. If he saw strangers on the land whom he did not want to be there he met them, challenged their right to be there and told them that they were not entitled to be there, and such people, being in a law-abiding country, accepted what he told them and went away. The first question we have to decide, therefore, is whether quarter sessions were right in holding that 1931 was the time when the right of the public to use the way was brought into question. Mr. Lamb has contended that one can only bring a matter into question if an assertion made on one side is disputed on the other; but I do not think that it is necessary, to bring a case within that provision in section 1 (6) of the Act, to say that when the owner denies to a person that there is a right of way that that person should thereupon insist that there is and perhaps proceed to try to assert his right by walking across the land or registering in some way his disagreement with what the owner has said. It seems to me that the owner raises the question by challenging the right of a person to walk along the road. If he says: "You have no right to be here," turning him off his land, he is raising the question that that person has no such right. He can certainly do it by putting up a notice which will raise the question, but it seems to me that he can do it also by telling a person to get off his land.

Therefore, the position is that for more than 20 years—in fact for over 40 years—the public used this way as a right of way. In 1931 and thereafter the question was raised whether the public had the right to use the way because the owner not only endeavoured to, but did, turn people back. By so doing, it seems to me that he brought the right of the public to use the way into question. I do not think that it is necessary for a member of the public to say: "I will bring an action against you," or "I will force my way or assert my right in some other way." The owner brings the right into question by refusing to allow the public the right to use what they had used for some 40 years. Therefore, I think that quarter sessions were right in holding in the present case that the material time when the right was brought into question was some time in 1931. No attempt has been made to give the exact month, nor does it matter; 1931 is the critical year, and if sessions were right in that, Mr. Lamb agrees that the appeal fails subject to the point whether the Act is retrospective.

We have listened to an interesting discussion on whether this Act is retrospective or not. It has been argued that although the 20-year period may begin before the Act came into force, it must determine after it has come into force because, it is said, the Act must not be construed retrospectively as it affects the rights of the landowner. Speaking for myself, I agree with the decision of Evershed J. in *Attorney-General and Newton Abbot Rural District Council* v. *Dyer*.[1] In that case Evershed J. held [2] that the Act was retrospective, that is to say, the fact that the time both began and ended before the Act came into force was immaterial for this purpose. It has always been held that a procedural Act does or may act retrospectively, and one test of whether an Act is a procedural Act is whether it is an Act which is mainly concerned with evidence. The Act under consideration is in many respects similar to the Prescription

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[1] [1947] Ch. 67; 62 T.L.R. 632; [1946] 2 All E.R. 252.

[2] [1947] Ch. 67, 87.

Act, 1832, which provided, as its preamble shows, that owing to the difficulties of proving user from time immemorial, certain changes in the law were desirable and, instead of a person who asserted that he was entitled to an easement over land or light or water having to give evidence from which the court could infer a grant or user from time immemorial, the Act substituted the prescriptive periods of 20 years in some cases and 40 years in others. That seems to me to be the object of the present Act. The long title, which does not help, is: "An Act to amend the "law relating to public rights of way; and for purposes connected "therewith." There is no preamble, but it seems to me that the main object of the Act is to substitute a definite period, namely, 20 years' user by the public, for the necessity of proving the fact of long user and so forth, from which common law dedication can be presumed. That being so, I think it is no objection to say, when the law has laid down that 20 years is the period over which the public are to be deemed to have acquired a right of way, that the 20 years would have terminated before the Act came into force. Section 1 (6) provides: "Each "of the respective periods of years mentioned in this section "shall be deemed and taken to be the period next before the "time when the right of the public to use a way shall have been "brought into question . . ." The material time is the period next before the time when the right of the public shall have been brought into question. The Act does not use the words "when "the right of the public to use the way shall have been brought "into question after the commencement of this Act." It simply provides that when it has to be determined whether there is a way or not, all one has to find is whether for 20 years before the landowner asserted in one way or another that there was no right of way, the public had used it as of right.

Considerable argument has been based on section 2 (1) of the Act, which provides: "Nothing in this Act shall affect any "proceedings pending at the commencement of this Act, and "where in respect of any way a court of competent jurisdiction "decides in proceedings so pending, or has before the com"mencement of this Act decided, that the way is not a highway, "this Act shall not apply except as respects enjoyment of the "way after the date of the decision." One can give illustrations of the way in which the Act may act unevenly, perhaps harshly, against some people and not against others, but I think that that subsection is one which was intended to give landowners before the Act came into force—it was passed on July 12, 1932, but did not come into operation until January 1, 1934—the opportunity of beginning an action in order to have the question of the existence or non-existence of a right of way determined. If they chose then to bring an action for a declaration that no right of way existed over the land or an action for damages for trespass, and could obtain a decision that at the time they issued the writ there was no right of way, then this Act was not to take away the right established in the action; but if they did not bring the action, then it seems to me that the Act will apply and they have to take their chance of whether it can be proved, as it was in the present case, that the public had established a right of way 20 years before the matter was raised.

For these reasons, I think that the court of quarter sessions came to a right decision.

HILBERY J. I am of the same opinion and for the same reasons.

STABLE J. I agree with the judgment delivered by my Lord on the first point as to whether by warning people off his land in the way he did the landowner was bringing the right of the public to use the way into question, and I have nothing to add on that point. As regards the retrospective effect of the Act, I have come to an opposite conclusion, and as the matter is one of far-reaching importance, I think that I should state the conclusion at which I have arrived.

The law, as I understand it, is as stated by Sargant J. in *In re Hale's Patent*,[3] where he says[4]: "No doubt the general law "is that, while rights are not statutorily altered retrospectively, "procedure is, apart from indications to the contrary, altered "retrospectively; but where rights and procedure are dealt with "together in the way in which section 8 of the [Patents and "Designs] Act of 1919 deals with them, the intention of the "legislature would seem fairly clear—namely, that the old rights "are still to be determined by the old tribunal under the Act of "1907, and that only the new rights under the substituted section "are to be dealt with by the tribunal thereby substituted for the "Treasury."

On the findings of the justices in the present case, on some date in 1931 the then owner of the land took action, and when I say "took action" I do not mean took legal proceedings, but took steps to assert that there was no public right of way over this land; and it is agreed that if this matter had been litigated in 1931, on the findings of the justices in this case, he would have been successful in establishing that he was entitled to the enjoyment of his park without any interference whatsoever by the public. In 1932 the Rights of Way Act was passed, and the successful contention of the respondents here is that the passing of that Act destroyed the right the owner enjoyed in 1931 to use his land without interference by the public and created a new right in the public to pass over that land. I need only refer to the opening words of section 1 of the Act: " Where a way, not " being of such a character that user thereof by the public could " not give rise at common law to any presumption of dedication, " upon or over any land has been actually enjoyed by the public " as of right and without interruption for a full period of twenty " years, such way shall be deemed to have been dedicated . . ." Subsection (6) of section 1 provides the terminal date of that 20 years, and it is on the construction of that subsection that it seems to me that this matter depends. [His Lordship read section 1 (6) and continued:]

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[3] [1920] 2 Ch. 377; 36 T.L.R. 832.

[4] [1920] 2 Ch. 377, 386.

If the prohibition by the appellant's predecessor in title and the appellant's prohibition of the public to use this land is regarded as a continuing matter then it was, as I think it should be, in operation when and after the Act came into force, but what is said here is that one has to go back to 1931 when the prohibition was first brought into force; in other words, that the terminal date of the 20-year period may be a date prior to the passing or the coming into operation of this Act.

Section 1 (3) provides: " A notice by the owner of the land " over which any such way passes inconsistent with the dedication of the way as a highway, placed before or after and " maintained after the commencement of this Act," is a notice as aforesaid which brings the right into question. That postulates that a notice, posted before the Act came into force, must be maintained after the Act comes into operation. If the only notice given by the owner in the present case was the notice referred to in section 1 (3), and if he had been sufficiently astute to pull it down immediately before the Act was passed into law, there would have been no terminal date to which the 20 years could run.

The other matter which appears to me to be remarkable is that section 2 (1) provides that nothing in the Act shall affect any proceedings which have been taken before the Act came into force or where proceedings are so pending. The result of that is this, that if in 1931, when the owner warned the public off, somebody had said: "You cannot do that, we have a right here," and he had brought an action, he would have been protected by that section. The only reason, presumably, why he did not bring an action was the finding by the justices that no member of the public asserted the existence of a right, no doubt for the very good reason that at that time no right existed for the public to assert. It does seem to me an extraordinary result where a number of landowners are in identical situations that those who do not choose to litigate because nobody asserts a contrary right should lose their rights whereas those against whom the contrary right is asserted and who do start litigation are protected. I would only add that it seems to me that the conclusion I have reached is reinforced by subsections (1) and (5) of section 1 and also by section 4 of the Act, which provides: "The person "entitled to the remainder or reversion immediately expectant "upon the determination of a tenancy for life or pour autre vie "in land shall have the like remedies by action for trespass or "an injunction to prevent the acquisition by the public of a "right of way over such land as if he were in possession thereof." I understand that that is an entirely new right conferred on reversioners, and one asks oneself what is the use of giving them that right if retrospectively any rights they had had been extinguished in 1931 when (a) there was no adverse right and (b) there was no machinery by which the reversioners could have protected the then existing position.

For these reasons, in my view, the Act operates in this way: the starting-point of 20 years can be any time before the coming into force of the Act; the terminal date must be a date after the Act came into operation.

Appeal dismissed.

E. M. W.

The landlord appealed.

[*Note.*—The submissions in the Court of Appeal as to the date at which the right of way had been "brought into question" were substantially the same as those in the Divisional Court and accordingly are not reported. The submissions on the quality and effect of the Act of 1932 were developed, with citations of cases not before the Divisional Court, and, as summarized below, supplement the submissions in that court.]

Percy Lamb Q.C. and *J. P. Widgery* for the landowner. The Act of 1932, the title of which is prayed in aid, is not substantially procedural, for it creates a public right where none existed before it came into force. It gives and defines rights: compare Lush J. in *Poyser* v. *Minors*,[1] on the distinction between "procedure" and the law which "gives or defines the right."

An Act is not to be construed to have retrospective operation, "unless such a construction appears clearly in the terms of the "Act, or arises by necessary and distinct implication": *West* v. *Gwynne*.[2] The dicta of Wright J., in *In re Athlumney, Ex parte Wilson*,[3] that "a retrospective operation is not to be given "to a statute so as to impair an existing right or obligation, "otherwise than as regards matter of procedure, unless that effect "cannot be avoided without doing violence to the language of "the enactment"; and that if the language "is fairly capable "of either interpretation it must be construed as prospective "only" are applicable here: see also *National Real Estate and Finance Co.* v. *Hassan*.[4]

Though section 2 (1) of this Act expressly saves rights in pending actions, it does not follow that Parliament thereby intended that as a whole it should operate retrospectively. In *In re Hale's Patent*[5] Sargant J. said that where rights and procedure were dealt with together, the old rights were to be determined under the old Acts and only the new rights were to be dealt with by the substituted tribunal.[6] That statement of general principle (on which Stable J. founded his dissenting judgment in the present case) is relied on as showing that so far as rights are affected this landowner's right in 1931 ought to be determined according to the law then in being, though inasmuch as the Act is procedural it may operate retrospectively. On the construction given to this Act by the majority in the Divisional Court a "notice . . . placed before or after and maintained after "the commencement of this Act" could not avail this landowner; nor would the right given to the reversioner by section 4 be of any use to him. In *Cooper* v. *Hubbuck*[7] Willes J.,[8] considering the very similar language of the Prescription Act, 1832, said that it created a right in land just as much as if it had been given by grant.

[DENNING L.J. Lord Goddard C.J. suggested that that Act was procedural.]

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[1] (1881) 7 Q.B.D. 329, 333.

[2] [1911] 2 Ch. 1, 15; 27 T.L.R. 444.

[3] [1898] 2 Q.B. 547, 552.

[4] [1939] 2 K.B. 61, 74; 55 T.L.R. 570; [1939] 2 All E.R. 154.

[5] [1920] 2 Ch. 377; 36 T.L.R. 832.

[6] [1920] 2 Ch. 377, 386–387.

[7] (1862) 12 C.B.N.S. 456.

[8] Ibid. 468.

Unfortunately *Cooper* v. *Hubbuck*[9] was not cited to the court. [*Lauri* v. *Renad*[10] was also referred to.] The decision of Evershed J. in *Attorney-General and Newton Abbot Rural District Council* v. *Dyer*[11] that this Act was substantially procedural was erroneous. The effect of procedural changes on rights was discussed in *Colonial Sugar Refining Co. Ltd.* v. *Irving*,[12] in which the Privy Council said that the right of appeal to that committee was a right which could not be taken away without express words. *Director of Public Prosecutions* v. *Lamb*,[13] where a regulation in clear language changed the punishment for an offence between the committing of the offence and the charge, is distinguishable.

[BIRKETT L.J. Are not the rules applicable to the criminal law different? At Nuremberg the lawyers argued for days on retrospective effect.]

There is authority that penal statutes are not to be construed retrospectively, and no person has a vested right in punishment. [*The Ydun*[14]; Maxwell on Interpretation of Statutes, 10th ed., p. 277, and Pratt and Mackenzie on The Law of Highways, 19th ed., p. 24, on "express dedication of a highway" were also referred to.] To construe this Act retrospectively would be to take away a right of property without compensation; and that is contrary to all the canons of construction.

J. Scott Henderson Q.C. and *M. G. Polson* for the council. The true question is not whether the Act is procedural, but what is its intention; this Act shows an intention to apply to past as well as to future user: in *Jones* v. *Bates*[15] Scott L.J.[16] said that this Act intended to bring the English law into line with the more sensible Scots law. The difference of language between section 1 (6) of this Act and the very similar language of section 4 of the Prescription Act, 1832, by which the words "shall have "been or shall be" in the latter Act have now been altered to "shall have been," is prayed in aid as showing Parliament's intention that the period of 20 years' user may be in the past as well as in the future. [*Colls* v. *Home and Colonial Stores Ltd.*[17] was also referred to.] In the present case this landowner has not been deprived of a right. He allowed the public to enjoy a right and the length of the enjoyment has crystallized the public right. *Attorney-General and Newton Abbot Rural District Council* v. *Dyer*[18] was correctly decided. As against *Colonial Sugar Refining Co.* v. *Irving*,[19] *Rathbone* v. *Munn*[20] and *Theo. Conway Ltd.* v. *Henwood*[21] decided that a right of appeal was a mere matter of procedure. This Act does not create new rights but it provides a method of procedure for establishing inchoate rights which have accrued. The passing of this Act did not destroy the right which the landowner had in 1931; if this matter had been litigated in 1931 the landowner would have succeeded. There is nothing in the language of this Act which is ambiguous; it deals with evidence and is substantially procedural, and it must be construed retrospectively.

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[9] 12 C.B.N.S. 456.

[10] [1892] 3 Ch. 402, 420–421; 8 T.L.R. 637.

[11] [1947] Ch. 67; 62 T.L.R. 632; [1946] 2 All E.R. 252.

[12] [1905] A.C. 369, 372–373; 21 T.L.R. 513.

[13] [1941] 2 K.B. 89; [1941] 2 All E.R. 499.

[14] [1899] P. 236; 15 T.L.R. 361.

[15] [1938] 2 All E.R. 237; 54 T.L.R. 648.

[16] [1938] 2 All E.R. 237, 244–245.

[17] [1904] A.C. 179; 20 T.L.R. 475.

Lamb Q.C. in reply. The words "shall have been" in section 1 (6) refer to the 17-month period between the passing and the coming into force of the Act, during which the landowner could put up a notice to stop the 20 years running. A notice would be nugatory if the Act is retrospective to a period which started and finished before the Act was passed, because the notice could not then affect the acquisition of the right by the public. [*Folkestone Corporation* v. *Brockman*[22] was also referred to.]

Cur. adv. vult.

DENNING L.J. There is a footpath at Bossington in Hampshire, which is used by the country folk as a way to get to Horsebridge station and Horsebridge village, and also as a walk round from Houghton. For 46 years from 1885 to 1931 this footpath was used by members of the public as of right without interruption. Some of the persons so using it were strangers to the locality, but it was mainly used by local residents. The case finds that since 1931 the landowner "made no attempt to prevent "local residents from using the said path, but if any other "member of the public was seen thereon by the landowner, he "was told that he had no right to be there." In 1953 the county council showed the footpath in their map as a footpath over which the public had a right of way. The owner thereupon objected and took the matter to quarter sessions. They decided that there was a public right of way along the path. Quarter sessions said that, if they had been asked to determine the matter at common law, they would have held that there was no public right of way along the footpath, because they were not satisfied that there was any intention by the owner to dedicate it as a highway: but quarter sessions went on to hold that the public have acquired a right of way under the Rights of Way Act, 1932. The owner appealed to the Divisional Court, which decided against him by a majority. He now appeals to this court.

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[18] [1947] Ch. 67.

[19] [1905] A.C. 369.

[20] (1868) 18 L.T. 856.

[21] (1934) 50 T.L.R. 474.

[22] [1914] A.C. 338; 30 T.L.R. 297.

The Rights of Way Act, 1932, has introduced a new means by which the public may acquire a right of way, in addition to the old means of dedication, which, be it noted, is still preserved: see section 2 (2). The new means of acquiring it is by prescription for 20 years. The old common law prescription for a right of way had to run from time immemorial, that is, from the time when Richard Coeur de Lion came to the throne in A.D. 1189. The new statutory period of 20 years has no fixed starting point, but only a finishing point. The public must have used the way as of right for the period of 20 years next before their right to use it was "brought into question." We have now to consider how the period of 20 years is to be calculated.

The thing to do is to find the finishing point and then count back 20 years. This means that in this case we have to find the time when the right of the public to use the way was first "brought into question by notice as aforesaid or otherwise" within section 1 (6) of the Act. Those words are obviously taken from the similar words in section 4 of the Prescription Act, 1832, which was considered by the Court of Common Pleas in *Cooper* v. *Hubbuck.*[1] In that case Willes J. said that[2] "in order to "have the claim 'brought in question' there must be at least "enough in the proceedings to apprise the parties that the claim "was advanced, so that there might be an opportunity of "litigating it." Applying those observations to this case, I think that in order for the right of the public to have been "brought "into question," the landowner must challenge it by some means sufficient to bring it home to the public that he is challenging their right to use the way, so that they may be apprised of the challenge and have a reasonable opportunity of meeting it. The landowner can challenge their right, for instance, by putting a barrier across the path or putting up a notice forbidding the public to use the path. When he does so, the public may meet the challenge. Some village Hampden may push down the barrier or tear down the notice: the local council may bring an action in the name of the Attorney-General against the landowner in the courts claiming that there is a public right of way:

[1] (1862) 12 C.B.N.S. 456.

[2] Ibid. 468.

or no one may do anything, in which case the acquiescence of the public tends to show that they have no right of way.

But whatever the public do, whether they oppose the landowner's action or not, their right is "brought into question" as soon as the landowner puts up a notice or in some other way makes it clear to the public that he is challenging their right to use the way.

Applying this test, I ask myself: when did the landowner here make it clear to the public that he was challenging their right to use the way? Quarter sessions held that he did so in 1931, when he objected to the use of the path by persons who were not local residents. We do not know what evidence was before them on that point. If the landowner merely turned back one stranger on an isolated occasion, that would not, I think, be sufficient to make it clear to "the public" that they had no right to use it. He ought at least to make it clear to the villagers of Bossington, Houghton and Horsebridge. They were the members of the public most concerned to assert the right, because they were the persons who used the path. They knew—better than the landowner himself—how long they had used it. They were the persons to tell. It was no good the landowner speaking to a stranger who would know nothing of the public right and would not be concerned to assert it. This view is supported by a case which was decided nearly a hundred years ago—*Reg.* v. *Broke* [3]—about a footpath at Ipswich. Sea-faring men proved that they had used the path without interruption for a great many years for the purpose of their calling. The landowner sought to rebut the public right by proving that he had turned back all persons who were not sea-faring men: but it was held that that was not sufficient for the purpose. Pollock C.B. said [4] that the user by the sea-faring men was a user by the public and that long user by them gave the public a right of way. If the landowner wished to deny the public right, he ought to have made it clear to the sea-faring men that they used it by his leave and not as of right. So, here, the landowner ought to have made it clear to the villagers. We have no information on this point, but I think we ought to assume that quarter sessions had sufficient evidence before them to support their finding. We ought to assume that in 1931 when the landowner turned back strangers, he did it in so open and notorious a fashion that it was made clear, not only to strangers, that they had no right to use the path, but also to local residents, that they only used it by tolerance of the owner. If so, he did bring the right into question in 1931, as quarter sessions have found.

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[3] (1859) 1 F. & F. 514.

[4] Ibid. 515.

In this connexion I would also mention the finding of quarter sessions that in and from 1931 the landowner, by turning off strangers, showed an intention not to dedicate the path as a highway for the use of members of the public at large. This raises the same point. In my opinion a landowner cannot escape the effect of 20 years' prescription by saying that, locked in his own mind, he had no intention to dedicate: or by telling a stranger to the locality (who had no reason to dispute it) that he had no intention to dedicate. In order for there to be "sufficient "evidence that there was no intention" to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large—the public who used the path, in this case the villagers—that he had no intention to dedicate. He must, in Lord Blackburn's words, take steps to disabuse those persons of any belief that there was a public right: see *Mann* v. *Brodie*.[5] Such evidence may consist, as in the leading case of *Poole* v. *Huskinson*,[6] of notices or a barrier: or the common method of closing the way one day a year. That was not done here; but we must assume that the landowner turned off strangers in so open and notorious a fashion that it was clear to everyone that he was asserting that the public had no right to use it. On this footing there was sufficient evidence to show that there was no intention to dedicate.

I think, therefore, that we should accept the findings of quarter sessions that the landowner brought the public right into question in 1931 and thereafter showed a sufficient intention not to dedicate the path as a highway. Even so, there is found to be 20 years' user by the public as of right before 1931: and the question is whether that is sufficient to give a statutory right to use the footpath. The difficulty is that the Rights of Way Act, 1932, was not passed until July 12, 1932, and did not come into operation until January 1, 1934. The 20 years' user before 1931 took place before the Act was passed. Can the public acquire a right of way by 20 years' user before the Act? Is the Act retrospective to that extent?

I must say at once that to my mind this Act of 1932 is not a procedural Act. It affects the substantive law in the following respects: it creates a new statutory right to a highway by prescription in addition to the old right by dedication. It reverses the burden of proof: for whereas previously the legal burden of proving dedication was on the public who asserted the right (*Folkestone Corporation* v. *Brockman* [7]), now after 20 years' user the legal burden is on the landowner to refute it. It gives reversioners a right to interfere and gives the public a right of way if they do not interfere: whereas previously reversioners had no right to interfere and the public could acquire no right of way against them. It is interesting to notice that the courts held that the Prescription Act, 1832, did not relate to pleading or procedure only: see *Cooper* v. *Hubbuck*,[8] *per* Willes J. Neither does this Act.

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[5] (1885) 10 App.Cas. 378, 386.

[6] (1843) 11 M. & W. 827.

Seeing that this Act does affect the substantive law, it is not to be given a retrospective operation unless such a construction appears very clearly on the terms of the Act or arises by necessary and distinct implication. I think, however, that such is the case here: the whole tenor of the Act is to establish a public right by 20 years' user; and the wording of section 2 (1) carries with it the necessary and distinct implication that, except as therein stated, the Act applies to enjoyment of the way before the commencement of the Act. This was the view of Evershed J. in *Attorney-General and Newton Abbot Rural District Council* v. *Dyer*,[9] and I agree with him.

Mr. Lamb pointed to the fact that Parliament allowed an interval of 17 months between the time when the Act was passed (July 12, 1932) and the time when it came into operation (January 1, 1934); and he asked: was not that period given so as to enable any landowner (who did not intend to dedicate a path as a highway) to put up a notice saying that his property was private, and that there was no right of way over it? I agree that that was the object of the interval; but I think the object is substantially achieved. If a notice were put up before 1933, it would have this effect: if the 20 years had not then run, the notice would prevent a public right being acquired; whereas if it had already run, the notice would serve as an emphatic assertion that the path had heretofore been used by tolerance of the owner and not by right of the public; and the longer it remained there without challenge the more effective it would be to prove the correctness of his assertion. If it was challenged before the end of 1933, the landowner could get the matter resolved by the courts under the law as it stood before the Act: see section 2 (1). If it was not challenged until after 1933, the new law applied;

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[7] [1914] A.C. 338; 30 T.L.R. 297.

[8] 12 C.B.N.S. 456, 468.

[9] [1947] Ch. 67, 89; 62 T.L.R. 632; [1946] 2 All E.R. 262.

but he could point to the acquiescence in the notice as a strong point in his favour to show that the enjoyment had not theretofore been had as of right.

My conclusion is, therefore, that the Act is retrospective. Once the 20 years' enjoyment has been had as of right by the public, then whether the 20 years' enjoyment was before or after the Act, the way is by the Act a highway; and the landowner cannot escape from that position by saying that he never intended to dedicate it as a highway. I would dismiss the appeal.

BIRKETT L.J. This appeal from a decision of the Divisional Court raises important questions affecting landowners and the members of the public under the provisions of the Rights of Way Act, 1932. [His Lordship stated the facts, and continued:] The main purpose of the Rights of Way Act, 1932, was to simplify the procedure when it was sought to establish a way as a public highway. It does not profess to alter the general law as to the manner in which public rights are deemed to have come into existence. The important change is in the length of time which is enough to establish the intention. If the way can reasonably be presumed to have been dedicated as public, then proof of public user for 20 years past is now enough, if the user has been "as of right," without interruption, and it is not proved by the landowner that the intention to dedicate the way was not continuous during the 20 years: *Jones* v. *Bates*[10]; *Merstham Manor Ltd.* v. *Coulsdon and Purley Urban District Council.*[11]

Section 1 (6) of the Act of 1932 provides that the 20-year period shall be deemed to be the period next before the time when the right of the public to use a way shall have been brought into question by notice or otherwise. This subsection differs from the corresponding provision in the Prescription Act of 1832, which required the periods of 20 and 40 years therein mentioned to be "next before some suit or action" in which the right was questioned. Therefore if today a member of the public is turned back from a footpath, on the ground that there is no right of way, and action is taken to assert the public claim, the period of 20 years necessary to be proved will be up to the date of the act of turning back, and not up to the time that the action to assert the public right is taken.

In the present appeal it is found that members of the public were turned back in 1931, and the same thing happened at

[10] 54 T.L.R. 648; [1938] 2 All E.R. 237.

[11] [1937] 2 K.B. 77; 52 T.L.R. 516; [1936] 2 All E.R. 422.

intervals after that date. The evidence made it clear that from 1885 to 1931 the public had been using this footpath "as of "right," without interruption, and on that evidence the footpath is deemed to have been dedicated under section 1 (1) of the Act of 1932, for there was no evidence at all that within that period there was no intention to dedicate the way. The act of the landowner in turning members of the public back in 1931, in my opinion, was "bringing the right into question," because if there had been user as of right for 20 years without interruption, and then steps were taken to stop members of the public from using the way on the ground that the public had no rights there at all, then this is clearly an occasion "when the right of the public to "use the way shall have been brought into question by notice "as aforesaid *or otherwise*": section 1 (6). There is no fixed method laid down by the Act by which the right is to be brought in question. The words "or otherwise" leave the matter at large. A barrier or a notice would, of course, bring the right into question; but when the landowner takes steps to stop members of the public using the way, for my own part I do not think there can be any clearer way of bringing the right into question. After 1931 the landowner showed an intention not to dedicate the path as a public highway; but his act then was unavailing. Forty-six years had passed between 1885 and 1931, and no evidence was given to show that in those years there was an intention not to dedicate the way as a public highway. Everything therefore turns in this appeal on whether the 46 years ending in 1931 are within the words of section 1 (1) of the Act of 1932.

The Act, although passed into law on July 12, 1932, did not come into force until January 1, 1934, and the requirement of a period of 20 years of which the subsection speaks was fulfilled in the present case before the Act was passed in 1932. This raises the important question whether the Act is intended to be retrospective in its operation. The rule is now well established that an Act is not to have retrospective effect, save in matters of procedure, unless the Act makes it plain that it is to have retrospective effect.

In the Divisional Court the view was taken that this Act dealt only with procedure, and the decision in *Attorney-General and Newton Abbot Rural District Council* v. *Dyer*[12] was followed. It is not always easy to maintain this clear distinction between Acts dealing with procedure only and Acts which create rights; and the Rights of Way Act of 1932, I should have thought, was more than an Act dealing with procedure only, as the Prescription Act of 1832 was held to be in *Cooper* v. *Hubbuck*.[13] Section 2 (2) of the Rights of Way Act, 1932, makes it quite plain that the new procedure under the Act is an *additional* method of establishing the dedication of highways, and does not abolish or alter the existing methods. In any cases where for any reason the Act has no application, the existing law can be used in the same way as it was used before the Act was passed. Thus, for example, if evidence of public user for five years is enough in all the circumstances of the case to prove the landowner's intention to dedicate, there is no need to prove the use for 20 years. The essential test is: what is the intention of the statute? In my opinion, while I think that the statute was not confined merely to procedure but was dealing with rights, I yet think that the intention of the statute was that it should be retrospective in its operation. Section 58 of the National Parks and Access to the Countryside Act, 1949, amended the Rights of Way Act, 1932, by deleting the concluding words of section 1 (1) and the whole of section 1 (2). The purpose of this was to make the period of 20 years apply in all cases, but in doing so there was in section 58 (2) of the National Parks Act a saving in favour of proceedings pending at December 16, 1949, and also for cases then decided by courts of competent jurisdiction. Similarly, section 2 (1) of the Act of 1932 is a transitional provision to prevent possible conflict between the old and the new law in cases already decided, or in cases in course of being decided when the Act came into force on January 1, 1934.

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[12] [1947] Ch. 67.

I am therefore of opinion that the period of 20 years laid down by the Act is not to be reckoned from January 1, 1934, but that any way used uninterruptedly and as of right for a period of 20 years can be claimed as a public way, whenever the period of 20 years occurred, subject to the provisions of the Rights of Way Act, 1932.

I agree with the conclusion of the Divisional Court that the footpath in question is a public way as claimed by the Southampton County Council, and that this appeal ought to be dismissed.

PARKER L.J. I have come to the same conclusion. Before the appeals committee of quarter sessions the only point taken on behalf of the appellant was that the 20-year period to be considered was that next before the proceedings in question, and that by reason of the action taken by the appellant and his predecessor since 1931 there was shown an intention during that period not to dedicate the footpath in question. I will assume that such action was sufficient evidence that there was no intention to dedicate, since the contrary was not argued, but it is to be observed that no action was taken in regard to a considerable section of the public, namely, "local residents" as described in the case, but only in regard to strangers. The question, however, remains whether, as the respondents contend, the right of the public to use the footpath had not been brought into question at an earlier date, namely, in 1931, when such action was first taken. The appeals committee and the Divisional Court held that this contention was right, and, accordingly, subject to the point hereinafter referred to, it is clear that as a result of what had happened between 1885 and 1931 the footpath pursuant to section 1 (1) of the Act is deemed to have been dedicated. I agree with this conclusion. It seems to me clear that from 1885 to 1931 the public were asserting a right to enjoy this footpath, so that if in 1931 steps were taken to warn off persons asserting such a right, such action was clearly bringing into question that right. The question is largely one of fact and, the appeals committee having so found, there is no reason to disturb that finding.

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[13] 12 C.B.N.S. 456.

Before the Divisional Court, however, and before this court, the appellant raised a more formidable point, namely, as to the retrospective operation of the Act. The Act was passed on July 12, 1932, and came into operation on January 1, 1934. It clearly applied to a 20-year period occurring wholly after January 1, 1934. It was conceded that it applied to a 20-year period commencing before and ending after January 1, 1934, but it was denied that it could apply to a 20-year period occurring, as in the present case, wholly before January 1, 1934. To support this, strong reliance was placed on the well-known principle that an Act is *not* to be construed so as to have retrospective effect, except in regard to matters of procedure only, unless the Act is clearly intended to have that effect.

It is sufficient to cite two passages from the authorities. In *In re Athlumney, Ex parte Wilson*[14] Wright J. said this[15]: "Perhaps no rule of construction is more firmly established than "this—that a retrospective operation is not to be given to a "statute so as to impair an existing right or obligation, otherwise "than as regards matter of procedure, unless that effect cannot "be avoided without doing violence to the language of the enact- "ment. If the enactment is expressed in language which is

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[14] [1898] 2 Q.B. 547.

[15] Ibid. 551–552.

"fairly capable of either interpretation, it ought to be construed "as prospective only."

In *In re Hale's Patent*[16] Sargant J. said[17]: "No doubt the "general law is that, while rights are not statutorily altered "retrospectively, procedure is, apart from indications to the "contrary, altered retrospectively; but where rights and procedure are dealt with together in the way in which section 8 "of the Act of 1919 deals with them, the intention of the legislature would seem fairly clear—namely, that the old rights are "still to be determined by the old tribunal under the Act of "1907, and that only the new rights under the substituted "section are to be dealt with by the tribunal thereby substituted "for the Treasury."

The Divisional Court (Stable J. dissenting) held that the Act applied where, as here, the 20-year period was wholly before the commencement of the Act. In arriving at his conclusion, Lord Goddard C.J. (with whom Hilbery J. agreed) said[18]: "It has always been held that a procedural Act does or "may act retrospectively, and one test of whether an Act is "procedural is whether it is an Act which mainly deals with "evidence. The Act under consideration is in many respects "similar to the Prescription Act, 1832, which provided, as its "preamble shows, that owing to the difficulties of proving user "from time immemorial, certain changes in the law were desirable and, instead of a person who asserted that he was entitled "to an easement over land or light or water having to give "evidence from which the court could infer a grant or user from "time immemorial, the Act substituted the prescriptive periods "of 20 years in some cases and 40 years in others. That seems "to me the object of the present Act." In other words, they treated the Act as a procedural Act, and, in doing so, came to the same conclusion as Evershed J. in *Attorney-General and Newton Abbot Rural District Council* v. *Dyer*,[19] who said[20]: "In the first place, it is to be borne in mind that the Act of "1932 is substantially a procedural Act, in the sense that it is "designed, not to create new rights or new causes of action, but "rather to simplify and render more easy the means of making "good claims of a well-established kind."

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[16] [1920] 2 Ch. 377; 36 T.L.R. 832.

[17] [1920] 2 Ch. 377, 386.

[18] Ante 448; [1956] 1 All E.R. 419.

[19] [1947] Ch. 67.

[20] Ibid. 88.

Mr. Lamb, for the appellant, has urged with considerable force that this Act, though it admittedly in part deals with matters of procedure, nevertheless, to use the words of Lush J. in *Poyser* v. *Minors*,[21] " gives or defines " legal rights. That was indeed the view of Stable J. in the present case. For my part, I think that that conclusion is right, and, without going into the matter in detail, I am content to adopt what was said by Willes J. in *Cooper* v. *Hubbuck*,[22] in dealing with the Prescription Act, 1832, which, as Lord Goddard C.J.[23] pointed out in the present case, the present Act resembles in many respects. Willes J., with whom Erle C.J. and Byle J. concurred, in considering section 4 of the Prescription Act (which was similar to section 1 (6) of the Act of 1932), said [24]: " The section in question is the last of those which deal with the creation of the right. It is not a section relating to pleading or procedure only, but has for its object to appoint the terminus of the period of prescription which by the previous sections was to confer a right. This it does by reference to the commencement of ' some suit or action wherein the claim or matter, &c., shall ' have been or shall be brought in question.' The effect, therefore, is that, immediately upon the bringing of such suit or action, the enjoyment, if within the previous sections as to length and otherwise, shall ripen into a right." This case was unfortunately not before the Divisional Court; nor was it referred to in *Attorney-General and Newton Abbot Rural District Council* v. *Dyer*.[25]

That, of course, does not dispose of the matter, because the question remains whether, even though the Act gives or defines legal rights, the intention is clear that it should have a retrospective operation. If so, it should be so construed, even if the consequences may in certain cases appear unjust or hard. In order to ascertain the intention, it is, I think, legitimate to consider not only the language used in, but the object of, the enactment.

In *Jones* v. *Bates* [26] Scott L.J. discussed at some length the purpose of the Rights of Way Act, 1932, in these words [27]: " Before discussing the evidence and judgment below, I want to consider what the law now is since the passing of the Rights of Way Act, 1932, which the judge had to apply. The new Act, as

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[21] (1881) 7 Q.B.D. 329, 333.

[22] 12 C.B.N.S. 456.

[23] Ante 448.

[24] 12 C.B.N.S. 456, 467.

[25] [1947] Ch. 67.

[26] [1938] 2 All E.R. 237.

[27] Ibid. 244–245.

" stated in its long title, was an amending Act. Before the Act, " the law applicable was the common law. The main alteration " is effected by section 1, which gives a new statutory effect to " mere proof of actual user as of right and without interruption. " At the time of the passing of the Act, the main outline of the " law affecting proof of a public highway, whether a carriage-" road, a bridle-path or a footpath, had been drawn quite clearly " by judicial decisions. Whereas in Scotland proof of 40 years' " user as of right, and without interruption in the enjoyment of " the right, *ipso facto* established the legal conclusion that the " way was public by prescription, in England no such convenient " rule of law had been evolved by our courts. Our legal theory " had always been—at any rate within the last century or two—" that the sole origin of a public highway was dedication to the " public use by the owners of the land over which it ran, and in " consequence that, in case of dispute, the public right could be " established only by such evidence as would justify an inference " of fact that the way had at some date, known or unknown, " been so dedicated. The corollary followed that, on this as on " all other issues of fact, the tribunal had to decide, once there " was some affirmative evidence before it of user, whether or not " on balance it was sufficient to establish dedication. That " decision if given by a High Court judge sitting alone, was open " to revision by a Court of Appeal, but not if given by a county " court or other court, whose decision on fact was made final by " statute. Whichever jurisdictional mode of deciding questions " of fact happened to have been invoked in the particular case, " the task of the tribunal of fact was not limited to deciding the " necessary questions of user—Was it of right? Was the exercise " of the right interrupted? How long had it continued? These " findings would in Scotland have sufficed for the decision of the " legal issue. In England, however, the tribunal had to deal " with such difficult investigations as the state of the title of the " owners and whether there was an owner who could dedicate, " and consequently sometimes even the time when the dedication " —usually quite imaginary—had in fact taken place. Above all " the other difficulties, the tribunal had solemnly to infer as an " actual fact that somebody or other had in fact dedicated. It " was often a pure legal fiction, and yet put on the affirmant of " the public right an artificial onus which was often fatal to his " success. The practical result of the English rule of law was " that in many cases, although quite a formidable body of " evidence was available to demonstrate what I will call the

"Scottish premises, the public claimant failed on the additional "English requisites. I infer from its terms that the Rights of "Way Act, 1932, was passed for the definite purpose of getting "rid of these extra difficulties of proof, and of assimilating our "English legal position to the more sensible one obtaining north "of the Tweed." Accepting his analysis, as I do, I would not expect to find any limitation on its operation.

Turning to the language used, it is to be observed that section 1 (6), which defines the 20-year period, introduces no limitation as to the time when the right of the public to use the way shall have been brought into question. Indeed, the words "by notice as aforesaid," which are clearly a reference back to subsection (3) and cover therefore a notice "placed before . . . "and maintained after the commencement of this Act," point to a period ending before the commencement of the Act.

Again, it seems to me that the necessary implication from section 2 (1) is that the Act is retrospective in operation. It was suggested that that subsection was necessary in order that the new provisions as to evidence (see section 3) should not apply to pending actions, and that this was its only effect. I cannot accept this argument, which appears to ignore the latter part of the subsection, where it says that in regard to decisions given before the commencement of the Act, and in regard to decisions given in actions pending at the commencement of the Act, "this "Act shall not apply except as regards enjoyment of the way after "the date of the decision." These words, as it seems to me, can only be explained on the basis that the Act, except to that extent, was intended to be retrospective. Indeed, that was the view of Evershed J. in *Attorney-General and Newton Abbot Rural District Council* v. *Dyer.*[28]

I appreciate that, as Stable J. pointed out,[29] this interpretation may in certain circumstances produce consequences which are hard and even extraordinary, but in my judgment the language of the Act taken as a whole is sufficiently clear to rebut the presumption. Accordingly, I would dismiss the appeal.

Appeal dismissed.
Leave to appeal to the House of Lords granted.

Solicitors: *Ashurst, Morris Crisp & Co.; Theodore Goddard & Co. for G. Andrew Wheatley, Winchester.*

M. M. H.

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[28] [1947] Ch. 67, 89.

[29] Ante 452.

C. A.

1956
Mar. 14, 15;
June 18, 19.

Singleton,
Jenkins and
Hodson L.JJ.

JOHN RIGBY (HAULAGE) LTD. *v.* RELIANCE MARINE INSURANCE CO. LTD.

Insurance—Loss—Goods—policy covering legal liability of assured for damage or loss of goods in transit and held by the assured in trust —Assured's business mainly conducted through sub-contractors— Lorry driver falsely representing that lorry was owned by sub-contractors and asking for return load—Collection order signed by assured and accepted by owners of goods—Goods loaded in lorry and driver given delivery order—Theft of goods by driver—Liability of insurers to indemnify assured.

The plaintiffs, road transport contractors, who possessed only one lorry and conducted the main part of their business through sub-contractors, had been granted by the defendants a third party cover insurance policy. The subject-matter of the policy as between the assured and the insurance company was declared in the policy to be "the legal liability of the assured for loss of or damage to ". . . general merchandise of every description belonging to the "assured or held by the assured in trust for which the assured are "themselves responsible, whilst in transit' for road conveyance "within England, Scotland or Wales."

In April, 1955, there was lying at a Liverpool dock a consignment of copper ingot bars, and the plaintiffs had entered into an oral arrangement with the shipping agents of the owners to carry for reward to consignees at Birmingham consignments of the copper whenever they had vehicles available. On April 18, X, driving a lorry, called at the Liverpool office of the plaintiffs, and, on his representations that he was employed by a transport company which was on the plaintiffs' list of sub-contractors, and that the lorry belonged to that company and he wanted a load for the return journey to Birmingham, he was given a collection order for 440 of the copper ingot bars by the acting manager of the plaintiff company. X duly presented the collection order to the shipping agents at the docks, the ingots were loaded on to his lorry, and he was given delivery notes and a note by the dock checker on presentation of which to the police at the dock gates he was passed out. X was not a servant of, nor did the lorry belong to, the transport company, and he and the copper were never heard of again.

The plaintiffs, contending that in the circumstances they had no defence to a claim by the owners of the copper, claimed that they were entitled under the policy to be indemnified by the defendants. The defendants denied liability on the ground, inter alia, that the ingots were at no time in the possession of the plaintiffs or held by them in trust:—

Held, that although the giving of the collection order was, as between the plaintiffs and X, an invalid authority to X to receive the goods, it was also an offer by the plaintiffs to the owners for whom the goods were to be carried to undertake their carriage to their destination; that offer having been accepted by the representatives of the owners, the plaintiffs were entrusted with the goods under the contract thus concluded, and, being liable for their loss, were entitled under the insurance policy to be indemnified by the defendants.

Waters v. *Monarch Fire and Life Assurance Co.* (1856) 5 El. & Bl. 870 and *Lake* v. *Simmons* [1927] A.C. 487; 43 T.L.R. 417 considered.

Decision of Barry J. reversed.

C. A.
1956

JOHN RIGBY (HAULAGE) LTD.
v.
RELIANCE MARINE INSURANCE CO. LTD.

APPEAL from Barry J.

The plaintiffs, John Rigby (Haulage) Ltd., road transport contractors of Liverpool, having only one lorry, carry out the main part of their business through sub-contractors, of whose names they keep a list. It frequently happened that a lorry driver of one of the sub-contractors, who had taken a load to Liverpool, called at the plaintiffs' office to ask if there was a load for his return journey. One of the companies with whom the plaintiffs sub-contracted was the Shenstone Transport Co. Ltd., of Birmingham.

In April, 1953, there was lying at No. 1 South Canada Dock, Liverpool, a considerable part of a large consignment of copper ingot bars ex the s.s. *Samanco*. The bars were in the custody of David Rees & Co. Ltd., general shipping agents, who were described in the documents as "the principals." The ingot bars had to be transported to Metal Sales Ltd., a subsidiary company of Imperial Chemical Industries, at Perry Barr, Birmingham. The plaintiffs had entered into an oral contract or arrangement with the principals that they would carry for reward such quantities of the ingot bars for the carriage of which they had available, from time to time, sufficient transport.

The following facts were agreed between the parties: During the morning of April 18, 1955, a person (hereinafter referred to as "X") who was not personally known to the temporary manager of the plaintiffs, a man named Newton, called at the plaintiffs' office and saw Newton, who was in charge of the office in the absence of the manager. X informed Newton that he was a driver employed by Shenstone Transport Co. Ltd., of Birmingham; that he was the driver of a 10-ton Bedford articulated lorry; and that after delivering the load of goods that was then on his lorry he was returning to Birmingham and was available to take a load of goods on his return journey. X was not employed by the Shenstone Transport Co. Ltd. Newton was aware of the contract with the principals, Rees & Co. Ltd., and that there was still a quantity of ingot bars to be carried to Birmingham. In view of the information given to him by X, which Newton believed, Newton inspected the loading book and ascertained that Shenstone Transport Co. Ltd. were a firm to whom the plaintiffs sub-contracted their work. He thereupon issued to X a collection order in respect of 440 of the aforesaid quantity of ingot bars, putting on the collection order the name of Shenstone Transport Co. Ltd., and the lorry registration number given to him by X, namely, JOF 745. Later on the same day X went to the Dock Shed at No. 1 South Canada Dock, Liverpool, where a quantity of the goods were then lying. There was a representative of the principals present at the shed and X handed to him the collection order. Four hundred and forty ingot bars were then loaded on to the lorry driven by X in sets of 22, under the supervision of the representative of the principals and a dock checker. The load was then sheeted by X, who was then given a delivery note in duplicate by the representative of the principals. The lorry did carry number plates bearing the registration JOF 745, but the same were false in that the registration was that of a private motor-car registered in the City of Birmingham. The value of the 440 ingot bars was £3,338 3s. 8d., and the total weight of the same was 9 tons 19 cwts. 1 qr. 26 lbs.

The delivery notes bore the name and description of the principals and contained, inter alia, the name and description of the consignees; the place where the goods were to be delivered; and the registration number of the lorry carrying the load in respect of which the notes were issued, together with the name of the driver of the same. Upon delivery of the load of goods carried by his lorry the driver of the same should give both delivery notes to the consignees or their representative, who would retain one and return the other to the driver after signing it so as to acknowledge receipt of the goods described in the same. The latter delivery note would then be given by the driver of the lorry to his employers who, in turn, would dispatch it to the firm on whose behalf they had carried the goods described in the delivery note. The dock checker, after checking the load at the dock shed and being satisfied that only 440 ingot bars had been loaded on to the lorry JOF 745, issued to X a document which acknowledged the fact that the load on the lorry had been checked by the dock checker and which document X was required to hand to the police officer who was on duty at the material time at the gates of No. 1 South Canada Dock, Liverpool, aforesaid. The document was given to the police officer by X as he left the dock. X did not deliver the ingot bars loaded on to his lorry to the consignees whose address was given in the delivery notes, nor had the same been redelivered to either the plaintiffs or the said principals. The whereabouts of X and the said ingot bars were not known to the plaintiffs or to the defendants or the said principals despite extensive inquiries by the police.

The plaintiffs were the holders of a policy of insurance issued by the defendants, the Reliance Marine Insurance Co. Ltd., following a proposal made to the Guardian Assurance Co. Ltd., of which company the Reliance was stated to be a subsidiary. By the policy it was agreed and declared "that the subject-"matter of this policy as between the insured and the said "company so far as concerns this policy shall be and is as "follows: The legal liability of the assured for loss of or damage "to timber, oil, machinery and general merchandise of every "description belonging to the assured or held by the assured in "trust for which the assured are themselves responsible whilst "in transit per road conveyance within England, Scotland or "Wales."

A claim for the value of the ingot bars having been made by the owners against the plaintiffs, the latter, contending that they had no defence to that claim, brought the present action against the defendants under the policy. The defendants denied liability on the ground, inter alia, that the ingots were never in the possession of the plaintiffs, or held by them in trust; that they were not responsible for the loss, the driver X having stolen the collection order by a trick, and the insurers were under no liability to indemnify the plaintiffs.

Barry J. found for the defendants on the ground that the plaintiffs had failed to establish that the goods were held in trust by them, and, therefore, the loss was not covered by the policy.

The plaintiffs appealed.

F. W. Beney Q.C. and *Andrew Rankin* for the plaintiffs. The loss of the goods was due to theft and the action is brought to determine whether the plaintiffs are liable for the loss and whether they are covered by the policy. Barry J. held that the plaintiffs are not entitled to a declaration that the defendants are liable to indemnify them. Although the proposal was made to the Guardian Assurance Co. it is admitted that it was really made to the Reliance Co., which is a subsidiary company. Both companies use a common proposal form. The judge found that the goods were lost probably some time after the vehicle left the dock gates. Therefore they were lost in transit. According to the policy: "Risk to commence from the time the goods are put in "motion at the point of departure preparatory to the transit and "to continue until arrival at destination and during loading and "unloading." The judge also found that the plaintiffs were liable to the consignees for the loss, for the reason that the kind of omnibus agreement made by the plaintiffs with Rees & Co. was too vague to be anything more than a preliminary contract. It is submitted that the contract between the plaintiffs and the principals, Rees & Co., was made when the collecting order was accepted by Rees & Co. by loading the copper on to the indicated lorry. The judge took the view that the plaintiffs broke that contract when they did not carry the goods to the consignees.

The point for decision is whether when the goods were lost in transit they were "held in trust" by the plaintiffs within the meaning of the policy. The court has to look at the relationship between the owners and the trustees, and it follows from the finding of the judge that the plaintiffs are liable for the loss and that they held the goods in trust. It is not possible to say otherwise. Having given the collection order to the driver, and on the strength of that order the goods having been loaded on to the indicated lorry, the plaintiffs are estopped from denying liability for the loss. They must assume the contractual burden of bailees. If the driver had for some reason repented of his criminal intention and carried the goods to Birmingham could it then be said that the plaintiffs did not hold the goods in trust? That is the simple question for decision. Did the plaintiffs become trustees of the goods? The basis of the plaintiffs' liability was that they had authorized the handing of the goods to the driver of the lorry. [*Waters* v. *Monarch Fire and Life Insurance Co.*[1]; *London and North Western Railway Co.* v. *Glyn*[2]; *Harrisons & Crossfields Ltd.* v. *London and North-Western Railway Co.*[3] were referred to.]

H. I. Nelson Q.C. and *J. M. Davies* for the defendants. The risk or loss in question was not covered by the policy. On the true construction of the contract the insurance company had undertaken to cover goods in transit in the lorries belonging to the plaintiffs or in lorries of the plaintiffs' sub-contractors. It follows that if the goods were not in transit in a lorry belonging to the plaintiffs or to one of their sub-contractors, then the loss was not covered by the policy. Further, under the terms of the policy the goods are only covered when held in trust by the plaintiffs, and as the goods were never in the possession of the plaintiffs and were never held in trust by them the loss was not covered by the terms of the policy.

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[1] (1856) 5 El. & Bl. 870.

[2] (1859) 1 E. & E. 652.

[3] [1917] 2 K.B. 755; 33 T.L.R. 517.

The position is that the goods have been stolen from the plaintiffs. It was a larceny of the collection note from the plaintiffs by the driver of the lorry by means of a trick—representing that the lorry was owned by the Shenstone Transport Co. and that he was in their service.

[SINGLETON L.J. It was not a larceny within the definition in the Larceny Act. The collection order was given to the driver by the plaintiffs' manager.]

By that trick he was able to get the goods loaded into the lorry and to obtain a delivery note from the shipping agents of the owners, Metal Sales Ltd. The whole transaction was fraudulent and void ab initio, and the plaintiffs made no contract either with the Shenstone company or with David Rees & Co., the shipping agents.

[SINGLETON L.J. What is the true position between the Metal Sales Ltd. or David Rees & Co. and the plaintiffs?]

David Rees & Co. could maintain an action for breach of contract against the plaintiffs and the latter would be estopped from denying it.

[HODSON L.J. But you say there was no contract between them.]

The plaintiffs are innocent persons, but they have held out that this thief was their agent and that would preclude their denying a claim by David Rees & Co. As to whether the plaintiffs entrusted the goods to the thief, the defendants rely on the decision of the House of Lords in *Lake* v. *Simmons*,[4] that fraud rendered the whole transaction void ab initio. Therefore it is contended that the plaintiffs never held the goods in trust and no contract was created between them and David Rees & Co. The judge has not found that there was a contract between the plaintiffs and David Rees & Co.

The question is: what is the scope of the contract that the defendants have made with the plaintiffs? The defendants rely on the terms of the policy; it relates to "goods in transit insur-"ance." It means transit in a lorry, because the plaintiffs describe themselves as "haulage contractors" and they were asked to state in the proposal the number of their vehicles. They replied that they had only one lorry and that the rest of their business was done with the lorries of sub-contractors. Therefore the policy covered only goods in transit in vehicles in the plaintiffs' ownership and goods in vehicles belonging to a sub-contractor. In view of a footnote to the proposal form that the proposal is to be the basis of the contract, and having regard to words appearing at the top of the policy itself, the insurance covered only claims which arose in respect of goods lost or damaged from or in the one vehicle belonging to the plaintiffs or other vehicles in respect of which there was a definite sub-contract.

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[4] [1927] A.C. 487.

[Singleton L.J. I doubt whether that submission is covered by the pleadings of the defendants.]

The point was raised at the hearing in the court below.

Beney Q.C. I do not remember that it was argued, but I accept my friend's statement that it was. It was not, however, dealt with by the judge.

[Singleton L.J. Moreover, the proposal was made to the Guardian Insurance Co. and not to the defendant company.]

Nelson Q.C. The goods which are the subject of the present claim were never in a lorry belonging to a sub-contractor of the plaintiffs.

The observations of Crompton J. in *Waters* v. *Monarch Fire and Life Insurance Co.*[5] are really consistent with what the House of Lords said in *Lake* v. *Simmons.*[6]

[Jenkins L.J. Are the plaintiffs contending that the giving of the collection order was an offer by them to David Rees & Co. to carry the copper to Birmingham in the indicated lorry?]

Beney Q.C. There can be only one answer. There was such an offer and the response to it was the loading of the goods on the lorry and the giving to the driver of the delivery note. There was in consequence a binding agreement between the plaintiffs and David Rees & Co.

The hearing of the case had been adjourned from March to June owing to the illness of the defendants' leading counsel.

Singleton L.J., having stated the facts as set out above, continued: It appears to me that the plaintiffs had no answer to the claim which was made against them. They had entered into a contract with David Rees & Co. Ltd. They had given them authority to hand the goods to the man they sent with the lorry, the number of which they gave. They were responsible in damages for breach of contract, or perhaps in an action of detinue. The plaintiffs considered that they were insured against the risk; but, as the insurance company did not pay, they commenced this action against them on August 11, 1955.

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[5] 5 El. & Bl. 870, 882.

[6] [1927] A.C. 487; 43 T.L.R. 417

Points of claim were delivered on October 7, 1955. Therein the plaintiffs set out the facts and plead: "By reason of the "premises the plaintiffs are legally liable to pay to Metal Sales "Co. Ltd. the said sum of £3,338 3s. 8d. in respect of the loss "of the said goods. Further, by reason of the premises, the "defendants are liable under the said policy to pay to the "plaintiffs the said sum of £3,338 3s. 8d. but the defendants "have failed and neglected to pay to the plaintiffs the said sum "or any part thereof. And the plaintiffs claim: (i) a declaration "that they were insured by and that they are entitled to be "indemnified in the sum of £3,338 3s. 8d. by the defendants, "against the said loss by virtue of the provisions of the "said policy; (ii) an order for payment of the said sum of "£3,338 3s. 8d. due from the defendants to the plaintiffs under "the said policy in respect of the said loss."

Points of defence were delivered on November 16, 1955, as follows: "1. The defendants admit the making of the policy of "insurance referred to in paragraph 1 of the points of claim and "they will refer to the said policy for the full terms and effect "thereof. 2. The defendants further admit the making of the "agreement referred to in paragraph 4 of the points of claim "and they admit that the plaintiffs issued a collection order to "the person referred to in paragraph 5 of the points of claim" —that is the oral agreement between the plaintiffs and David Rees & Co. Ltd.—"and thereby purported to make a sub-"contract with Shenstone Transport Ltd. It was an implied "term of the said agreement that the plaintiffs might enter into "sub-contracts for the carriage of the said ingot bars. 3. The "defendants deny that the plaintiffs are responsible for the "alleged loss (which is not admitted) or that they are legally "liable to the said David Rees & Co. Ltd. and/or Metal Sales "Ltd. in the said sum or at all. 4. If (which is denied) the "plaintiffs are responsible for loss of the said ingot bars the "defendants further deny that they are liable under the said "policy to pay to the plaintiffs the said or any sum. The alleged "loss was not a loss in transit and the said ingot bars were not "held in trust by the plaintiffs. 5. The defendants deny that the "plaintiffs are entitled to the relief claimed or to any relief."

I thought it right to refer to the points of defence because of a question which was raised on the hearing before this court.

Mr. Nelson took a point arising on the proposal form; and I will deal with that point now, in order to get it out of the way. The proposal form is on the form of the Guardian Assurance Co. Ltd. We were told that the defendants are a subsidiary company of the Guardian Assurance Co. Ltd. However, the proposal which is put before us is addressed to the Guardian Assurance Co. It is headed "Goods-in-transit insurance"; the name of the proposer is sought and given, and likewise the address and the occupation. The next information desired, and the one on which this point arises, is: "1. State (a) kinds of "goods generally carried," the answer to which is "General "merchandise"; "(b) Radius of transit—(Answer): Great "Britain. (c) Whether A, B, or C Licence—(Answer): All. "(d)" the important one, "Registration numbers of all vehicles "to be insured."

From that it rather looks as though the proposal form was a form intended to be used in regard to the insurance of vehicles. The answer given is: "One vehicle, registration number BTB "807, otherwise sub-contracted." The insurance which was proposed was insurance against third party risks; against claims, that is, made upon the plaintiffs in respect of goods which were lost or damaged while in transit from one place to another, the plaintiffs being contracting carriers. The answer "otherwise "sub-contracted" appears at first sight to be no more and no less than an explanation given by the plaintiffs to the insurance company of how it was that they only had one lorry to carry goods of the value stated later in the proposal.

Mr. Nelson submitted that, in view of a footnote to the proposal form, that the proposal is to be "the basis of the "contract," and in view of some words on the top line of the policy itself, the defendant insurance company was only covering claims which arose out of goods lost or damaged from, or in, the one vehicle belonging to the plaintiffs or other vehicles in respect of which there was a definite sub-contract. He placed reliance on the words "otherwise sub-contracted." I wondered at the time whether that submission was covered by the pleading to which I have referred. It is not mentioned in the judgment. Mr. Beney does not remember its being argued in the court below, though he accepts it from Mr. Nelson that the point was taken by him. It rather appears that not much importance was attached to it, if and so far as it was understood to be a separate point.

I do not think it is right to say that, by reason of that answer in the proposal form, the policy covers only goods carried in vehicles which are the subject-matter of a sub-contract. I do not see that that follows. The information required was as to the registration numbers of vehicles to be insured. The assured quite rightly disclosed the fact that the greater part of their haulage work was done by sub-contracting. The liability of the insurance company on this policy depends upon the policy itself. In my judgment, the answer in the proposal to which I have referred is of no importance, nor does it limit the rights of the plaintiffs. I do not think it is pleaded, as it should have been if the point was seriously taken. It is, however, one of the agreed facts that in pursuance of the proposal form and declaration made to them by the plaintiffs the defendants issued to the plaintiffs the policy on which this action is brought. In view of that admission or agreement, I need say no more upon the fact that there was no proposal to the defendant company. The proposal was to the Guardian Assurance Co. Ltd. It may be that the admission or agreement would not have been in the same terms if the point taken by Mr. Nelson had appeared in the points of defence as an issue between the parties.

Now I come to the policy itself upon which the appeal falls to be determined. The first clause is: "Whereas it hath been "proposed to the Reliance Marine Insurance Co. Ltd. by John "Rigby (Haulage) Ltd.," and the premium is stated, the value of the goods under risk is stated, the period is stated. Then I read: "And it is also agreed and declared that the subject-matter "of this policy as between the insured and the said company so "far as concerns this policy shall be and is as follows upon: "The legal liability of the assured for loss of or damage to "timber, oil, machinery and general merchandise of every "description belonging to the assured or held by the assured in "trust for which the assured are themselves responsible whilst "in transit per road conveyances within England, Scotland or "Wales. Risk to commence from the time the goods are put "in motion at the point of departure preparatory to the transit "and to continue until arrival at destination and during loading "and unloading. Subject to conditions as attached." That is the policy issued by the Reliance Marine Insurance Co. Ltd. and bearing the signature of its chairman. I confess, in view of the terms of the policy, that I was a little surprised at the point being taken upon the proposal form and argued in this court; but I have stated it, and I say no more about it.

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Singleton L.J.

It was under the last clause in the policy which I have read that the plaintiffs put their case. They claimed that they were under a legal liability to meet the claim in respect of the missing goods. The defendants disputed the claim made against them and said that the goods did not belong to the assured, nor were they held by them in trust, even if it could be said that they (the plaintiffs) were responsible in damages for the loss.

The claim came before Barry J., and on December 16, 1955, the judge gave judgment in favour of the defendants. He said: "Looking at the facts set out in paragraph 5 of the memorandum, it is, I think, difficult to envisage any contractual "obligations which flowed from the oral agreement made "between the plaintiffs and Rees & Co. Ltd. in the terms "described in that paragraph. It is, I think, much more "probable that no binding contract was formed until the plaintiffs proffered a lorry at the docks and this lorry was loaded "with ingots belonging to Metal Sales Ltd. When that had "been done, then a binding contract for the carriage of those "goods, on the terms of the over-all arrangement described in "paragraph 5, would, of course, be constituted." That is in accordance with the argument submitted by Mr. Beney on behalf of the plaintiffs. I think Mr. Nelson was not prepared to admit that there was a contract.

The judge, in another passage, said: "It is true that the "relevant words of the policy refer to 'the legal liability of the "'assured,' but this liability, as I construe the policy, is only "a liability for loss or damage to merchandise belonging to the "assured or held by the assured in trust, for which the assured "are themselves responsible. In my judgment, the plaintiffs, "in order to recover, must establish that in truth these goods "were held by them in trust, and this, I think, they have failed "to do. The goods were stolen from Metal Sales Ltd., or their "agents, in Liverpool and never came into the plaintiffs' possession. The defendants are not, as I see it, affected by any "estoppel which may arise between the plaintiffs and their "customers, David Rees & Co., or Metal Sales Ltd. The defendants are, I think, entitled to insist that, on the true facts, "this loss must be shown to fall within the policy. Any other "construction would, I think, involve the substitution of the "words 'held in trust or deemed to be held in trust' for the "existing language of the policy." And at the end of the judgment there is this passage: "In these circumstances, and, "as I say, with some regret, in that I do feel that the plaintiffs "are placed in a position of very considerable hardship, or may "be placed in a position of very considerable hardship as a result "of the dishonesty of this man, none the less I have come to the "conclusion that this claim must fail and there must be judg-"ment for the defendants." The plaintiffs appeal against the judgment of Barry J.

However much sympathy one may feel for the plaintiffs, and however much one may regret the position in which they have been placed by the repudiation of the defendants of their claim, it must be realized that the court is solely concerned with the question of liability. Mr. Nelson submitted that X was a thief and that the plaintiffs could not be said to have received the goods or to have held them in trust. He said that X stole the collection order. That is not in accord with the definition of "larceny" in the Larceny Act, 1916, for X did not take the collection order without the consent or against the will of the true owners, nor did he intend to deprive the owner permanently of it. He did with it just that which he was expected to do.

The question whether the goods were held in trust by the assured is of greater difficulty. We were referred to *Lake* v. *Simmons*,[1] and in particular to the speeches of Lord Haldane and Lord Sumner. In that case, the plaintiff, a jeweller, was insured under a Lloyd's policy against loss or damage to jewels by, inter alia, theft. The policy contained a clause exempting the insurers from liability in the case of "loss by theft or dis-"honesty committed by . . . any customer or broker or broker's "customer in respect of goods entrusted to them by the assured." A woman, E. E., who had previously bought some articles at the plaintiff's shop, induced the plaintiff to let her have possession of two pearl necklets by fraudulently representing that she was the wife of a certain person and that she wanted them for the purpose of showing them to her husband and to a purely fictitious person for their approval, with a view to purchase by them. E. E. disposed of the necklets for her own benefit. In an action on the policy to recover the value of the necklets the insurers pleaded the exemption clause. The trial judge found that E. E.'s conduct was fraudulent throughout, and held that she was guilty of larceny by a trick, and the House of Lords accepted these conclusions. It was held, first, that the plaintiff had not entrusted the necklets to E. E., because there was no real consent by him to her obtaining possession of them, and, secondly, that, quoad the particular goods, E. E. was not a customer within the meaning of the clause. The decision of the majority of the Court of Appeal was set aside and the judgment of the judge of first instance restored.

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[1] [1927] A.C. 487, 494, 503.

I do not consider that great help is given by the decision in that case to the solution of the question before this court. The facts are wholly different. There was in that case no third party who gave any instruction. There was no document such as the collection order. The question in the present case seems to me to depend on the documents, coupled with the usual course of business in a case in which sub-contracting forms an essential feature, to the knowledge of the insurance company. The words "in trust" in the policy do not mean that the goods are held under some form of legal trust.

I would draw attention to the words used in the judgments in *Waters* v. *Monarch Fire and Life Assurance Co.*[2] The plaintiff in that case made with the defendants a policy of insurance against fire, in which the plaintiff was described as a corn and flour factor; the policy was, amongst other things, on goods in his warehouses, and on "goods in trust or on commission therein." The defendants covenanted to make good any damage by fire to the property insured. The plaintiff was a wharfinger and warehouseman; he had in his warehouses goods belonging to his customers, which were deposited with him in that capacity, and on which he had a lien for the charges for cartage and warehouse rent, but no further interest of his own. No charge was made to the customers for insurance; nor were they informed of the existence of the policy. The plaintiff's warehouse was consumed by fire, with all the goods in it. The defendants paid the value of the plaintiff's own goods, and the amount of his lien on his customers' goods; but refused to pay the value of the customers' interest in the value of the goods beyond the lien. It was held that the goods of the customers were in trust, within the meaning of the policy; and that the plaintiff was entitled to recover the entire value.

The court had to consider the meaning of the words "in "trust" as used in that policy. I propose to read no more than a few words from the judgments; first, that of Lord Campbell C.J. He said[3]: "What is meant in those policies by the words "'goods in trust?' I think that means goods with which the "assured were entrusted; not goods held in trust in the strict "technical sense, so held that there was only an equitable "obligation on the assured enforceable by a subpoena in

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[2] (1856) 5 El. & Bl. 870.

[3] Ibid. 880.

"Chancery, but goods with which they were entrusted in the "ordinary sense of the word." Wightman J. said[4]: "There "are two questions. The first, Whether the goods destroyed "were covered at all by the policies. The policies are on various "descriptions of goods; and, amongst others, on goods 'in trust.' "It seems clear to me that the goods in question were in trust. "The plaintiffs are warehousemen and wharfingers; and the "goods were in their warehouse; they had a lien on them, subject "to which they were accountable to the owners who had "entrusted them with the goods. So the goods lost were goods "in trust." Crompton J. said[5]: "The parties meant to insure "those goods with which the plaintiffs were entrusted, and in "every part of which they had an interest, both in respect of "their lien and in respect of their responsibility to their bailors."

We ought to approach the question in this case with the judgments in that case in mind. Mr. Beney, in opening the appeal before the break, some months ago, claimed that there was a contract between the plaintiffs and David Rees & Co. Ltd. when the collection order was handed by X to that company, the principals, and was accepted by the company's representative by the loading of the copper on the lorry. Thereby, he submitted, there was a contract between the plaintiffs and David Rees & Co. Ltd. that the plaintiffs would carry on the lorry which they had sent to the South Canada Dock those goods, 440 ingot bars, to their destination at Birmingham.

I am satisfied that there was a contract between the plaintiffs and David Rees & Co. Ltd. That came about from their oral arrangement, followed by the collection order which was handed to X by the plaintiffs, to be handed, and which was handed, to David Rees & Co. Ltd., and by the latter's acceptance of it by taking the collection order, handing over the goods to X, and giving to him a delivery order with, on it, the destination of the goods. The collection order, April 18, 1955, is addressed to the Master Porter, s.s. *Samanco*, Canada Dock: "Please receive in "good order and condition 440 copper ingots, 9 tons 18 cwts. "3 qrs. 2 lbs., Shenstone Transport, JOF 745," which was the number on the plate borne by the lorry, "account David Rees." The document was signed by the acting manager of the plaintiff company, and it has upon it "No. 5226," which is the plaintiffs' file number. X, having presented the document, received the goods. They were checked. He was given a delivery note, which refers to goods from *Samanco*, Canada Dock. It reads:

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[4] 5 El. & Bl. 881.

[5] Ibid. 882.

"Received from David Rees & Co. Ltd. in good order and "condition the undermentioned goods:—Mark, Quantity. Destination: Messrs. Imperial Chemical Industries Ltd., Metals "Division, Holford Casting Department, Perry Barr, Birmingham 20." The goods are described, and the weight is given. The one to which I refer is not the actual one, or one of the actual two. They have not been seen since. It is a specimen.

When one looks at those two documents, it becomes quite clear what the usual course of business was, and what was done in this particular case. There was an offer by the plaintiffs to take, on a numbered lorry, 440 bars for transport to Birmingham. That offer was accepted and the goods were loaded on the faith of the collection order, and the driver was given the delivery order with the destination of the goods upon it. The loss fell upon the plaintiffs because they sent a man and lorry to receive the goods and they gave him an authority to receive them on their behalf. The man was handed the goods on the authority of the plaintiffs, and he signed for them on the delivery order to Imperial Chemical Industries. Thus, the goods were entrusted to the one the plaintiffs sent in order that the plaintiffs could carry out their contract to convey. In other words, they were entrusted to the plaintiffs.

This is the only question in the case; and I believe that it should be resolved in favour of the plaintiffs. If I authorize (a) my wine merchant to deliver goods to X on my behalf and (b) X to receive the goods on my behalf and, following upon the authority, the wine is delivered to X, that is delivery to me, and it matters not that X is dishonest. The same applies in a case where similar authority is given when the goods are required by me for the purpose of fulfilling a contract. It arises from the authority which is given and the terms of which may vary from time to time.

In my view, the goods were held in trust, within the meaning of those words in the clause in the policy. Barry J. was quite right in saying that there was a contract between the plaintiffs and David Rees & Co. Ltd. It appears to me that it follows from that contract, coupled with the documents and course of business, that the goods were delivered to the plaintiffs and were held by them. They were under contract to carry them to Imperial Chemical Industries at Birmingham. I am in favour of allowing the appeal and of ordering that judgment be entered for the plaintiffs for the agreed amount.

JENKINS L.J. I am of the same opinion. I think it is clear that there was no contract as between the plaintiffs and the Shenstone Transport Co. Ltd. in regard to the carriage of the 440 copper ingots, for X, the thief with whom Newton dealt, in fact had nothing whatever to do with that company. I think it is also clear that as between the plaintiffs and X there was no contract in regard to such carriage, for Newton dealt with X simply in his pretended capacity as a driver employed by the Shenstone company. Again, I think it is clear that as between the plaintiffs and X there was no valid appointment of X as the plaintiffs' agent to collect and transport the goods on the plaintiffs' behalf. I think that appears from the speeches in the House of Lords in *Lake* v. *Simmons*,[6] to which my Lord has already referred. But Newton did make out and sign a collection order nominating the Shenstone company as the plaintiffs' sub-contractors who were to receive and transport the goods, and specifying the lorry JOF 745 as the vehicle on which they were to be transported. This document Newton gave to X with the intention that X should present it to the consignees' agents at the docks and thereby procure delivery of the goods, which X in fact did. Inasmuch as Newton gave this document to X in the belief that X was a driver employed by the Shenstone company, as he fraudulently pretended to be, I think that it must be held that as between the plaintiffs and X this document was wholly invalid as an authority to X to collect the goods on the plaintiffs' behalf. That again, I think, follows from the speeches in *Lake* v. *Simmons*.[6]

Mr. Nelson submits that in these circumstances there was no entrusting of the goods to the plaintiffs within the meaning of the words "held by the assured in trust" in the policy (which he agrees should be understood in the wide sense indicated in *Waters* v. *Monarch Fire and Life Assurance Co.*,[7] to which again my Lord has referred), but a mere handing over of the goods to a fraudulent stranger who had possessed himself by a trick of a collection order purporting to authorize him to receive them. It follows, in Mr. Nelson's submission, that there was no loss to which the policy was applicable, and that the plaintiffs' claim against the defendants under the policy must consequently fail, any liability incurred by the plaintiffs to the consignees by estoppel, based on the fact that the plaintiffs, by issuing the collection order, purported to authorize X to receive the goods, being for this purpose irrelevant.

[6] [1927] A.C. 487; 43 T.L.R. 417.

[7] 5 El. & Bl. 870.

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JOHN RIGBY (HAULAGE) LTD. v. RELIANCE MARINE INSURANCE CO. LTD.

Jenkins L.J.

The case is, I think, a difficult one; but, on the whole, I am for rejecting Mr. Nelson's argument. The collection order, as I see it, performed two functions. It was a purported, but as between the plaintiffs and X an invalid, authority to X to receive the goods, but it was also an offer by the plaintiffs to the persons for whom the goods were to be carried (whom I will call "the owners") to undertake the carriage of the goods to their destination in Birmingham, with an intimation that the work would be carried out by the Shenstone company as the plaintiffs' sub-contractors, who would use for that purpose lorry No. JOF 745. This offer the owners accepted by the delivery of the goods to X, the loading of them on the lorry with their concurrence, and the issue to X of the delivery note. The plaintiffs thus became liable to the owners under the contract of carriage so concluded between themselves and the owners for the safe carriage of the goods. The theft of the goods was a loss for which the plaintiffs were liable under this contract, and it would have been no answer to a claim by the owners in respect of such loss for the plaintiffs to say that they had been misled by X into believing that X was a driver employed by the Shenstone company, and that lorry No. JOF 745 was one of the Shenstone company's lorries, whereas, in fact, X was a thief driving a stolen lorry falsely numbered JOF 745.

But the question remains: was there, in these circumstances, an entrusting of the goods to the plaintiffs within the meaning of the policy? I think there was. Inasmuch as the policy admittedly extended to goods carried by the plaintiffs' sub-contractors, and inasmuch as practically all the plaintiffs' business was, to the knowledge of the defendants, done through sub-contractors, it seems impossible to hold that "entrusting" to the plaintiffs is limited to cases in which the plaintiffs come into actual physical possession of the goods. In the ordinary case, where a genuine sub-contractor is employed, the transaction is, I understand, carried out in the same way as the transaction now in question; that is to say, the plaintiffs give the sub-contractors' representative a collection order serving the double purpose of an authority to the sub-contractors to receive the goods and an offer to the owners to undertake the carriage of the goods. The owners accept the offer by delivering the goods to the sub-contractor designated by the plaintiffs. There is no privity of contract between the owners and the sub-contractors, whose bona fides and identity are exclusively the concern of the plaintiffs, by whom they are selected. In the ordinary transaction, as I have described it, I think the owners entrust the goods to the plaintiffs and not to the sub-contractors, albeit that physical possession of the goods is given to the sub-contractors direct at the request of the plaintiffs instead of being given in the first instance to the plaintiffs and by them to the sub-contractors.

If this is right, what difference can it make that the plaintiffs, by an innocent mistake, nominated sub-contractors with whom, in fact, they had not contracted, because a thief with a stolen lorry had falsely misrepresented himself as an employee of those sub-contractors and purported to undertake the work on their behalf? So far as I can see, none. The collection order clearly designated a particular lorry, JOF 745, represented by the plaintiffs (albeit mistakenly) as being the Shenstone company's lorry, as the vehicle in which the goods were to be carried by the Shenstone company, designated by the plaintiffs (albeit mistakenly) as their sub-contractors. I think that in handing over the goods to the driver of the designated lorry in accordance with the plaintiffs' request, the owners were entrusting them to the plaintiffs just as much as if X had in truth been the Shenstone company's employee, and the designated lorry had in truth been the Shenstone company's lorry.

Accordingly, I think the loss occasioned by the theft of the goods is covered by the terms of the policy. I agree with my Lord that Mr. Nelson's alternative submission, to the effect that the policy only extended to goods carried in the plaintiffs' own lorries or on lorries subject to sub-contracts with them, cannot be supported. I do not think the policy, which contains no such limitation, should be construed as being so limited by reference to the answer to question 1 (d) of the proposal form. That question asks for the registration numbers of all vehicles to be insured, and it is answered in the words "One vehicle registra-"tion No. BTB 807; otherwise sub-contracted." This relates simply to registration numbers and has nothing to do with the limitation suggested by Mr. Nelson. Moreover, even if it was relevant to Mr. Nelson's contention, it would not, I think, be admissible for the purpose of construing the policy (see *Griffiths* v. *Fleming*,[8] the particular passage being in the judgment of Kennedy L.J.).

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[8] [1909] 1 K.B. 805, 817; 25 T.L.R. 377.

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Accordingly, for the reasons given by my Lord, and such reasons as I have been able to add, I agree that this appeal should be allowed.

Hodson L.J. I agree. On the question of construction put forward as a separate point by Mr. Nelson, there would, of course, be no difficulty in his way if he were right in saying that this policy was limited to goods carried on the plaintiffs' own lorry or on sub-contractors' lorries. There is no such provision in the policy itself. The risk insured against is contained in the subject-matter of the policy, which has to do with " the legal " liability of the assured for loss of or damage to timber, oil, " machinery and general merchandise of every description " belonging to the assured or held by the assured in trust for " which the assured are themselves responsible whilst in transit " per road conveyances within England, Scotland or Wales." There has been no application to rectify the policy and, as has already been pointed out by my Lords, it could only be upon such an application that the contents of the proposal form could be relevant.

Nevertheless, the statement of agreed facts having set out that the policy was based upon a particular proposal form, the point has been argued in this court on the footing that one can look at the proposal form in order to see whether the words of the policy are limited. I am clearly of opinion that, even so, the words of the policy are not limited in the manner suggested and cannot be so limited, as Mr. Nelson has sought to establish. The material answer which was given in the proposal form (which, incidentally, was made to another company) is the answer to question 1 (d), which asked the proposed assured for the registration numbers of all vehicles to be insured. The answer was " One vehicle," with a registration number given, " otherwise " sub-contracted." The insurance policy did not cover vehicles to be insured. It covered the merchandise on the vehicles. The answer was a perfectly truthful one, and the words " otherwise " sub-contracted," in my view, indicate an explanation added as a footnote by the person who filled in the form, explaining why he was only giving one number of a motor vehicle.

So far as the main question argued on this appeal is concerned, the judge came to the conclusion that although the plaintiffs were under obligation to David Rees & Co., the agents for Metal Sales Ltd., and that there was a binding contract between them for the carriage of goods, nevertheless the goods were not held in trust by the plaintiffs within the terms of the policy. He held that the plaintiffs were liable to David Rees & Co. for the loss, that the contract was made when the note was handed by the driver to the dock checker, and David Rees & Co. accepted the offer by loading the cargo onto the lorry. In any event, in my view, that is a correct conclusion from the agreed facts.

It is submitted by Mr. Beney that it follows from that conclusion that they were held in trust by his clients. That, if they were held at all, they were held in trust I think there can be no doubt. Mr. Nelson's argument, as I understand it, is that they were never held at all. The words " in trust " are not used in these cases as terms of art, as the authorities to which reference has been made clearly show. *Lake* v. *Simmons*[9] was not dealing with the words " in trust." It was dealing with the word " entrust," which has the same effect in an insurance policy; and it was pointed out by the speeches in that case that the word " entrust " is a simple word which may well mean, in its context, such an everyday transaction as a handing over of an umbrella by a man to a bystander while he puts on a coat. The context here of the words " held in trust " is the context which I have already read, " held by the assured in trust for which the " assured are themselves responsible whilst in transit."

Coming back to Mr. Nelson's submission, it is that they were never held by the plaintiffs at all, that the goods were held by a thief. I agree with my brother Jenkins that, in the somewhat difficult question which we have to consider, it does not necessarily follow that there must be physical possession on behalf of the plaintiffs for them to hold the goods, because if, in the ordinary course of business, the work had been done by genuine sub-contractors, it could not be strictly said that the goods were held by the plaintiffs; yet it would not, I think, be contended that the plaintiffs were not covered under this policy. But that they must be held in some way under the plaintiffs' direction I think is clear. I take the view that the plaintiffs were in a position to exercise control, although the thief had got a collection order and collected the copper ingots from the docks. At any time, if they found out he was a thief, they could have intervened, turned him from the driving seat and put another driver in. Notwithstanding any protest that David Rees & Co. might have made, they were in control of the operation. The position would have remained the same if the thief, being frightened, had continued on his journey to his proper destination and been overcome and robbed by a rival gang of thieves. At all material times the goods were held in trust by the plaintiffs within the sense of the contract.

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[9] [1927] A.C. 487.

Lake v. *Simmons*[9] was very strongly relied upon by Mr. Nelson. Indeed, I think he regarded it as the main support of his argument. I would point out that that was a case in which the plaintiff, a jeweller, was insured under a Lloyd's policy against loss or damage to jewels by theft. The policy contained a clause exempting the insurers from liability in the case of "loss by theft or dishonesty committed by . . . any customer "or broker or broker's customer in respect of goods entrusted to "them by the assured." The question in that case was whether goods had in fact been entrusted by the jeweller to a thief. The thief in that case was a woman who had previously bought articles at the jeweller's shop and induced him to let her have possession of two pearl necklets by fraudulently representing that she was the wife of a certain man (a man called Van der Borgh), and that she wanted them for the purpose of showing them to her husband and to a purely fictitious person for their approval, with a view to purchase. She made away with the necklaces.

The point which was decided by the House of Lords which is material to this case was that the plaintiff, the jeweller, had never entrusted the necklaces or necklets to the thief, because there was no real consent by him to her obtaining possession of them. The question, I emphasize, was whether or not there had been any entrusting to the thief, not whether there had been any entrusting to Van der Borgh, the husband, or the other man who was mentioned, who turned out to be a fictitious person. That that possible situation was envisaged appears from the speech of Lord Sumner.[10] Referring to the thief, he said: "She was not "the person who was to approve or to buy or return them—"; that is, the necklets—"that was Mr. Van der Borgh or Com-"mander Digby. If there was entrusting, it was to one of them. "One of these persons was imaginary. The other was not a "customer and he was not, in fact, aware of what was being "done or concerned in it in any way."

So that the question of entrusting seems to me to have arisen there in entirely different circumstances from the way in which it arises in this case. The question is not, in this case, whether there was an entrusting to the thief. The question is whether there was an entrusting to the plaintiffs; and I, for my part, do not find that the argument which Mr. Nelson has put forward is supported by the speeches in *Lake* v. *Simmons*,[11] although it is quite true to say that it throws light on the position of the thief himself, and supports the argument (which, in my view, does not advance this case) that there was no validity in the appointment or supposed appointment of X as the agent of the plaintiffs.

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[9] [1927] A.C. 487.

[10] Ibid. 508.

Mr. Nelson further supported his argument that this transaction could never produce any legal result at all, in view of the character of the thief X, by saying that the collection order was itself stolen from the plaintiffs by the thief. I do not accept that view. There was no question of the thief endeavouring to get this document against the consent of the owner or with the intention of depriving him of it permanently; and the position would have been exactly the same if the collection order had been sent by post, or, indeed, I would suggest, if an order had been given over the telephone. The authority was not given to the thief; the authority was given by the plaintiffs to David Rees & Co. to have these goods loaded on the lorry named and identified in the collection order. For these reasons, I agree that this appeal should be allowed.

Appeal allowed.
Leave to appeal to House of Lords refused.

Solicitors: *Layton & Co.; Thomas Cooper & Co. for Batesons & Co., Liverpool.*

A. W. G.

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[11] [1927] A.C. 487.

1955
Oct. 24, 25,
26, 27, 28;
Nov. 11;
Dec. 19.

Sellers J.

C. A.

1956
April 20, 23,
24, 25, 26.

Denning, Birkett and Parker L.JJ.

REGAZZONI *v.* K. C. SETHIA (1944) LTD.

[1954 R. No. 1639.]

Contract — Illegality — Foreign prohibition — Contract for sale of jute bags c.i.f. European port—Intention that contract goods be shipped from India for resale to South Africa — Prohibition by Indian Government of export of goods to South Africa — Recognition of prohibition by English courts—Such recognition not enforcement of foreign penal, revenue or political law—Contract not enforceable in English courts.

Conflict of Laws—Confiscatory or political legislation.

In September, 1948, the defendants agreed to sell and deliver to the plaintiff a large quantity of jute bags, September/October shipment, c.i.f. Genoa at 248 shillings per 100. At that time India was the largest and cheapest producer of jute bags and South Africa a large consuming country, but, by way of political protest and on account of a dispute which had arisen between India and South Africa about the treatment of Indian nationals in South Africa, the Indian Government had, by regulations made under powers conferred by the Sea Customs Act, 1878, prohibited the export of goods to South Africa direct and sought to avoid indirect shipments, infringement of the regulations making the goods liable to confiscation and the shipper, or person held responsible, to a penalty. Consequently, South Africa was restricted in its purchases of jute bags and was prepared to pay high prices for any made available. Both the plaintiff and the defendants were well aware of the prohibition and that it would be unlawful for a shipper to export either directly or indirectly to South Africa, but they sought to take advantage of the situation, and both parties contemplated and intended that the contract goods would be shipped from India and made available in Genoa for resale to the South African buying agency. In an action by the plaintiff claiming damages for non-delivery of the jute bags, Sellers J. gave judgment for the defendants. On appeal:—

Held, by the Court of Appeal, affirming the decision of Sellers J., that while the English courts will not enforce foreign revenue or penal laws, they will not entertain an action based on a transaction which is knowingly intended to involve a breach of such laws; accordingly, the appeal must fail even if the same rules applied to political as to revenue laws and this was such a law.

Foster v. *Driscoll* [1929] 1 K.B. 470; 45 T.L.R. 185 applied; *Holman* v. *Johnson* (1775) 1 Cowp. 341 distinguished, and dictum of Lord Mansfield C.J. at p. 343 disapproved.

Observations on the meaning of "political" laws.

Per Denning L.J. These courts will not enforce revenue or penal laws at the instance of a foreign country. It is quite another matter to say that we will take no notice of them. It seems to me that we should take notice of the laws of a friendly country, even if they are revenue laws or penal laws or political laws . . . at least to this extent, that if two people knowingly agree together to break the laws of a friendly country or to procure someone else to break them or to assist in the doing of it, then they cannot ask this court to give its aid to the enforcement of their agreement.

Per Birkett L.J. I am satisfied that none of the principles which apply to revenue, penal or confiscatory law apply in this case.

Per Parker L.J. Whether it can be classed as a penal, revenue or political law or not, this is not a case in which such a law is sought to be enforced either directly or indirectly. What is being done here is to ascertain whether the performance of the contract involves the breach of the law of a foreign and friendly State; and provided that the law does not offend on some ground as being contrary to public policy, such as laws concerning slavery or the like, I can see no reason in principle why the result should depend upon the nature of the law itself.

Decision of Sellers J. affirmed.

ACTION.

In September, 1948, the defendants, K. C. Sethia (1944) Ltd., agreed to sell and deliver to the plaintiff, Polisseno Regazzoni, 500,000 new B. twills (a recognized description for jute bags of standard quality) at 248 shillings per 100 B. twills, September/October shipment c.i.f. Genoa, payment to be made against shipping documents guaranteed by a Swiss banking firm. The agreement was reached through the agency of one T. Raydt, of Hamburg, on behalf of the defendants, and one Weil, of Basle, on behalf of the plaintiff. At the time of the making of the contract and at all material times India was the largest and cheapest producer of jute bags. South Africa, for the purpose of bagging the country's grain crops, was a large consuming country, and the South African Government had its own buying agency; but the Indian authorities, by way of political protest, did not allow the export of jute bags to South Africa direct, and sought to avoid indirect shipments; consequently South Africa was greatly restricted in its purchases of such bags and was prepared to pay high prices for, and to buy practically unlimited quantities of, any bags made available. Prior to the contract, before August, 1947 (when India became independent) a meeting took place in Zurich between B. L. Sethia, a director of the defendant company, and the respective agents of the plaintiff and the defendants; the meeting was for the purpose of finding a way to take advantage of the situation, and the defendants offered to supply jute bags c.i.f. a European port, but their director did not wish to know "officially" that the consignment would be directed to South Africa, and neither side wished to invoke any unnecessary publicity or to have regard for any customary trading terms. Both parties to the contract, however, contemplated and intended that the contract goods would be shipped from India and be made available in Genoa so that the plaintiff might make a resale or fulfil a bargain of sale to the South African buying agency.

On September 7 the defendants informed the plaintiff that the B. twills must be delivered on German quota c.i.f. Hamburg, but the plaintiff insisted on shipment being made to Genoa and, in the result, the goods were not delivered.

The plaintiff, after unsuccessfully bringing proceedings in Germany against Raydt, sued the defendants for damages for non-delivery of the twills. The defendants denied liability; they contended, inter alia, that there was no complete or concluded contract, and, alternatively, that the contract, if any, was to the plaintiff's knowledge an illegal contract and/or was void and unenforceable in that it had for its purpose an object which was illegal and/or contrary to public policy, namely, the taking and shipment of jute goods from India when the ultimate destination was the Union of South Africa, in breach of regulations 2 (*c*) (6) 46 (1) and (2), made by the Government of India and the Indian Sea Customs Act, 1878.[1] They also contended before Sellers J. that since the plaintiff knew that they were the principals and that T. Raydt was their agent, he had, by his action in the German Civil Court, elected to pursue such remedies as he might have under the contract against T. Raydt and had thereby lost any right to maintain the present action. It was agreed that the proper law of the contract was English law.

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[1] Sea Customs Act, 1878 (Act No. VIII of 1878), s. 19: "Power to "prohibit or restrict importation or "exportation of goods. The [Central "Government] may from time to "time, by notification in the [Official "Gazette], prohibit or restrict the "bringing or taking by sea or by "land goods of any specified description into or out of British "India. . . ."

S. 134: "Power to prohibit tran-"shipment. The [Central Govern-"ment] may from time to time, by "notification in the [Official Gazette], "prohibit at . . . all ports, the tran-"shipment of any specified class of "goods, generally or when destined "for any specified ports. . . ."

Reg. No. 2c (6)/46, dated July 17, 1946: "(1) In exercise of the "powers conferred by section 19 of "the Sea Customs Act, 1878 . . . the "Central Government is pleased—. . . "(*b*) to prohibit the taking by sea "or by land out of British India of "goods from whatever place arriving "which are destined for any port or "place in the Union of South Africa "or in respect of which the Chief "Customs Officer is satisfied that the "goods although destined for a port "or place outside the Union of South "Africa are intended to be taken to "the Union of South Africa. . . ."

"(2) In exercise of the powers "conferred by section 134 of the Sea "Customs Act, 1878, the Central "Government is pleased—(*a*) to pro-"hibit the transhipment at any port "in British India of goods when "destined for any port in the Union "of South Africa, and (*b*) to prohibit "the transhipment at any port in "British India of goods when "destined for any port other than a "port in the Union of South Africa, "save with the permission of the "Chief Customs Officer who shall not "grant such permission unless he is "satisfied that it is not intended that "such goods shall be taken to the "Union of South Africa."

Neil Lawson Q.C. and *E. J. Cohn* for the plaintiff. Assuming that the Indian law was considered a prohibition of export, the prohibition does not affect the rights of the parties under this contract because it has no extraterritorial effect and neither of the contracting parties were subject to Indian law. The court is entitled to see how Indian courts would regard the position; if performance had involved illegality under Indian law, and that had been the proper law of the contract, section 56 of the Indian Contract Act, 1872 (No. IX of 1872), would have given a right to damages; if the Indian law gives a remedy, the English courts can do no less.

In any case, performance of the contract would not of necessity have involved either party in a breach of Indian law: compare *Central India Mining Co. Ltd.* v. *Société Coloniale Anversoisse*[2] and *Hindley & Co. Ltd.* v. *General Fibre Co. Ltd.*[3]

The Indian prohibition on the export of jute to South Africa is a law of a political character such as the courts of this country will disregard; it is a discriminating law, directed by one member of the Commonwealth against another, restricting trade in the Commonwealth, and it would be contrary to public policy for an English court to enforce it. Furthermore, it is penal or confiscatory and as such is unenforceable: see *Le Couturier* v. *Rey*[4] and Dicey's Conflict of Laws, 6th ed. (1949), p. 152, rule 22.

A. A. Mocatta Q.C., *Richard Vick* and *Peter Kenworthy Browne* for the defendants. The object of the contract was to effect the export of jute from India to South Africa; it therefore involved a breach of the Indian prohibition and is unenforceable by English law: *Foster* v. *Driscoll*,[5] *Ralli Brothers* v. *Compania Naviera Sota y Aznar*[6] and *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft.*[7] All the parties knew that the goods would come from Calcutta; it would be unreal to assume that they would be otherwise obtained, and the court must have regard to the realities of the situation: see *per* Lord Porter in *Partabmull Rameshwar* v. *K. C. Sethia (1944) Ltd.*[8]

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[2] [1920] 1 K.B. 753.

[3] [1940] 2 K.B. 517.

[4] [1910] A.C. 262; 26 T.L.R. 368.

[5] [1929] 1 K.B. 470; 45 T.L.R. 185.

[6] [1920] 2 K.B. 287; 36 T.L.R. 456 (sub nom. *Sota y Aznar* v. *Ralli Brothers*).

[7] [1939] 2 K.B. 678; 55 T.L.R. 814; [1939] 3 All E.R. 38.

It is a novel proposition that the prohibition is not enforceable in the English courts because Indian law gives a right to damages, but in any event section 56 of the Indian Contract Act, 1872, does not apply, for that section only applies where "the promisee "did not know" of the illegality; in this case both parties did know and sought to take advantage of the situation.

The nature of the Indian law is not such that the English courts will disregard it. It is not a revenue law, for it will not raise revenue unless infringed. Nor is it a confiscatory law; such laws, in this context, arise in totally different circumstances. The adjective "political" does not assist the plaintiff. [Reference was also made to *Government of India, Ministry of Finance (Revenue Division)* v. *Taylor*[9] and to Cheshire's Private International Law, 4th ed. (1952), p. 142.] There is no authority for the non-enforcement of a political law other than in cases concerning status or confiscation. Although considerations of public policy are relevant, it is doubtful whether the political character of a foreign law has ever formed the basis of the principles underlying non-enforcement on the ground of public policy: see the remarks of Scrutton L.J. in *Ralli Brothers* v. *Compania Naviera Sota y Aznar.*[10] It is difficult to determine what rules of public policy will displace a foreign law, but it would certainly be contrary to public policy to enforce a contract intended to violate the law of a friendly power. In Cheshire on Private International Law, 4th ed. (1952), p. 225, the proposition that a contract illegal by the lex loci solutionis but not by the proper law is unenforceable in England is queried, and see the observations of Warrington L.J. in *Ralli Brothers* v. *Compania Naviera Sota y Aznar*[11] and also the judgment of Lord Wright in *Rex* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft.*[12]

Neil Lawson Q.C. in reply. Whether or not the Indian prohibition has characteristics which are contrary to public policy, it is unenforceable on other grounds, namely, that under the Indian Sea Customs Act, 1878, it is penal in its consequences and, in that it exposes goods to the risk of confiscation, it is confiscatory: compare *Frankfurther* v. *W. L. Exner Ltd.*,[13] where a foreign confiscatory decree, although not strictly penal, was regarded in this country in the same way as a foreign penal law.

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[8] [1951] 2 Lloyd's Rep. 89, 96.

[9] [1955] A.C. 491; [1955] 1 All E.R. 292.

[10] [1920] 2 K.B. 287, 304.

[11] Ibid. 297.

[12] [1937] A.C. 500, 519.

[13] [1947] Ch. 629.

The courts are reluctant to find illegality and the contract itself must be looked at to see whether illegality is in fact involved. The contract in this case is not necessarily illegal by Indian law; although both parties contemplated that the goods should originate in India, the contract itself does not require that they should be of Indian origin or that shipment should be from an Indian port, nor is there anything requiring re-shipment to South Africa. The remarks of Lord Porter in *Partabmull Rameshwar* v. *K. C. Sethia (1944) Ltd.*[14] do not apply to this case; there the goods were clearly to be of Indian or Pakistan origin. Where a contract is silent as to the origin of the goods and their place of shipment the court cannot read into it a condition that they shall come from or be shipped in a particular place: *In re Anglo-Russian Merchant Traders Ltd. and John Batt & Co. (London) Ltd.*[15]; *Twentsche Overseas Trading Co. Ltd.* v. *Uganda Sugar Factory Ltd.*[16]

The English courts will not compel a party obliged to pay to break the law of the place of payment, but neither will they excuse a party who can legally pay according to the law of the place of performance merely because payment would break a foreign law to which such party is subject. There was no illegality in this contract so far as the law of the place of performance was concerned. In *Ralli Brothers* v. *Compania Naviera Sota y Aznar*[17] the place of payment was Spain; that case was followed in *De Beéche* v. *South American Stores Ltd. and Chilean Stores Ltd.*,[18] but compare *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft*,[19] where the place of payment was England. *Foster* v. *Driscoll*[20] was a totally different type of case; there there was a "highwaymen's" partnership and an illegal venture. Scrutton L.J. dissented[21]; Lawrence L.J.[22] dealt with the case on the basis that it was a partnership for an illegal purpose; Sankey L.J.[23] distinguished cases of the sale of goods where there was a flavour of illegality but where the contract was nevertheless valid, because (1) the American law was intended to prevent a malum in se rather than a malum prohibitum, and (2) all the parties concerned took an active part in the venture.

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[14] [1951] 2 Lloyd's Rep. 89, 96.

[15] [1917] 2 K.B. 679.

[16] (1944) 172 L.T. 163; [1945] W.N. 11.

[17] [1920] 2 K.B. 287.

[18] [1935] A.C. 148; 51 T.L.R. 189.

[19] [1939] 2 K.B. 678.

[20] [1929] 1 K.B. 470.

[21] Ibid. 484.

[22] Ibid. 500.

[23] Ibid. 514, 518, 519.

Cur. adv. vult.

December 19. SELLERS J. read the following judgment, in which he stated the facts as set out above, referred to the *Soponata* case,[1] found that the contract sued on was sufficiently established, held that the plaintiff was a proper party to the contract, and continued: I do not find anything in the unsuccessful German proceedings which has precluded the plaintiff from suing the defendants. He had not abandoned his right to sue the principal. He had obtained no judgment, credit or benefit. He had before this action merely sued the wrong person and not the party with whom he had in fact contracted.

The final defence raised at the trial was that the contract sued on was invalid and unenforceable by the proper law of the contract (which it was agreed was English law) as its performance invoked a breach of Indian law. Before considering the position in law it is desirable to ascertain from the evidence what prohibitions and restrictions were in force in India at the material time, the contract calling for shipment September/October, 1948.

The evidence of the Indian law was given by Mr. Joseph Nissim, a member of the English Bar who had held judicial and legal appointments in India and had been legal adviser to the Government of Bombay and to the Government of India. On account of a dispute which had arisen between India and South Africa about the treatment of Indians in South Africa, the Indian Government exercised powers under their Sea Customs Act, 1878, which enabled the Government, by notice in the Official Gazette, to prohibit or restrict the import or export by sea or land of goods of any specified description.

In exercise of those powers a regulation, 2c (6)/46 (1), dated July 17, 1946, prohibited "the taking by sea or by land out of "British India of goods from whatever place arriving which are "destined for any port or place in the Union of South Africa or "in respect of which the Chief Customs Officer is satisfied that "the goods, although destined for a port or place outside the "Union of South Africa, are intended to be taken to the Union "of South Africa."

Under the provisions of the Sea Customs Act, 1878, an infringement of the regulation would make the goods liable to confiscation and the shipper (or the person held responsible) liable to a penalty of three times the value of the goods. If the Customs Officer felt any suspicion that the regulation might be violated he could require a bond, under section 138 of the Act, as security that the goods would be duly shipped, exported or landed at the place for which they were entered outwards or would be otherwise accounted for to the officer's satisfaction. If a bond had been called for, its purpose would have been fulfilled by the bond giver producing a landing certificate for the goods, which apparently would have presented no difficulty.

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[1] *Sociedade Portuguesa de Navios Tanques Ltda.* v. *Hvalfangerselskapet Polaris A/S* [1952] 1 T.L.R. 220; [1952] 1 Lloyd's Rep. 71.

On June 10, 1947, a notice was given from the Customs House, Calcutta, signed by the Deputy Jute Shipments Co-ordinator, that direct shipments only of jute and jute goods would be allowed to territories which had a seaboard of their own and which enjoyed direct shipping facilities. In cases where direct shipments were impracticable, necessitating shipment via an intermediary port such as Aden or Port Said, shipments would be permitted only on the condition that the shippers entered into a bond undertaking to produce within three months a certificate of landing from the government of the country of final destination to the effect that the consignments in question had reached the ultimate destination. Failure to produce such a certificate within the time stipulated would render the shipper concerned liable to penal action. This notice would appear to have been given in order to draw attention to the existing law and to indicate the manner of its enforcement. As it was obligatory for a shipper to ship direct to the ultimate port of destination (except where impracticable) the customs authority could enforce more readily the prohibition against shipments to South Africa. At all material times the export of jute goods to all destinations was subject to an export licence issued by the Indian Government, and it would seem that through the necessity for the export licence the provisions of this export control could be enforced.

Mr. Nissim said that in his view the Indian authorities in administering the prohibition for export to South Africa indirectly were in practice not acting on mere suspicion and were freely issuing licences to Genoa, not wishing to interfere too much with a vital export from India. That is hardly a matter of law, but he said also that mere knowledge or suspicion that the goods might go to South Africa would not affect the shipper. It would seem that the question would arise on the shipper's application for an export licence and whether he could faithfully state what was the destination of the goods. So far as confiscation of the goods is concerned, the right would appear to depend on what in fact was the destination of the goods, whether the shipper knew of it or not.

Reference was made to section 56 of the Indian Contract Act, 1872 (Act No. IX of 1872), and that part of it which provides as follows: "where one person has promised to do something "which he knew, or, with reasonable diligence, might have "known, and which the promisee did not know, to be impossible "or unlawful, such promisor must make compensation to such "promisee for any loss which such promisee sustains through "the non-performance of the promise."

In my view that provision would not have benefited either of the parties to this action in a suit in India against the Indian shipper, if such could be envisaged, as I am clearly of opinion that both of the parties were well aware of the restrictions and that it would have been unlawful for the shipper to export directly or indirectly to South Africa. It was not, however, unlawful for goods to be shipped to European ports, either Genoa or Hamburg, and there appear to have been legitimate quotas allocated to these countries and to some extent additional quotas to shippers who could obtain an export licence and lawfully ship. A shipment, however, to these ports would have been contrary to the regulations and therefore illegal if it had in fact the ultimate destination of South Africa.

There is no evidence that the proposed shippers, of whom little was said at the trial, knew of the intended ultimate destination of the goods in question. Since the defendants knew, they either told the shippers, which is perhaps unlikely, or concealed the destination from them, and in any case, if the contract had been fulfilled, there would have been released from India goods which, if the true facts had been known by or revealed to the authorities, would have been prohibited from export.

Both parties to this contract contemplated and intended that the contract goods would be shipped from India and be made available in Genoa so that the plaintiff might make a resale or fulfil a bargain of resale to the South African buying agency. That had been decided generally by the agents and Mr. B. L. Sethia at Zurich. Not only was India the source of supply discussed then, but that India was to be the source of supply was indicated by the high price, although that is not conclusive. It is also supported by evidence that, at the time of the contract, India would have been the only source of supply for a contract of 500,000 bags for fairly prompt delivery and not spread over a very long time. On the other hand, the contract, no doubt for good reason, did not expressly state that the goods were to be of Indian origin and a delivery of the specified quantity of B. twills c.i.f. Genoa would have been a good delivery from whatever source they had come. It is in these circumstances that the question has to be considered as to whether the contract is to be treated as unenforceable in these courts.

I reject Mr. Lawson's submission that the prohibition regulations are to be regarded as either penal or revenue enactments (although infringement of the regulations might involve penalties and fines which would enhance the revenue) or to be regarded as confiscatory (as, for example, in *Frankfurther* v. *W. L. Exner Ltd.*[2]) so that these courts would not give effect to them. Restrictions on trade, both ingoing and outgoing, have been imposed by many, if not all, countries on a variety of commodities and for varying reasons. For instance, in *Ralli Brothers* v. *Compania Naviera Sota y Aznar*[3] Scrutton L.J. states that the Spanish decree which fixed the maximum freight on jute imported into Spain appeared to be part of a system for keeping down the price of goods essential for national welfare by, amongst other means, fixing the freight on goods coming into Spain. Penal consequences followed infractions of those laws. The court held the Spanish decree to be effective and as it made the payment of freight above 875 pesetas per ton illegal that part of the contract which required the payment of freight in excess of that amount was invalid and could not be enforced against the charterers.

It was submitted before me, however, that the Indian prohibition was a "political" law which our courts would disregard. Reference was made to Dicey's Conflict of Laws, Rule 22, 6th ed. (1949), p. 152, which states that the court has no jurisdiction at all to entertain an action for the enforcement, either directly or indirectly, of a penal, revenue or political law of a foreign State. On p. 155 there appears this statement: "There "is a marked tendency, by no means confined to the courts of "England, to construe foreign legislation of a political and con-"fiscatory character as restrictively as possible, for example, by "construing it as operating only within the territory of the "sovereign."

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[2] [1947] Ch. 629.

[3] [1920] 2 K.B. 287; sub nom. *Sota y Aznar* v. *Ralli Brothers*, 36 T.L.R. 456.

The prohibition here does only operate in India. Can it be disregarded as being "political"? If "political" is to be interpreted as comparable to "confiscatory," this Indian law was not that. It was argued that the motive behind the prohibition made it a "political" law which our courts would disregard, and especially so as India and South Africa are both within the British Commonwealth of Nations. I reject the argument. I would be most reluctant to enter upon a delicate and perhaps distasteful inquiry into another country's motives for its legislation within its own realm, unless there were the most compelling necessity.

In *Loucks* v. *Standard Oil Company of New York*,[4] a New York case, cited in Cheshire, Private International Law, 4th ed. (1952), pp. 142, 143, Cardozo J. said: "We are not so provincial "as to say that every solution of a problem is wrong because we "deal with it otherwise at home. . . . The courts are not free to "refuse to enforce a foreign right at the pleasure of the judges, to "suit the individual notion of expediency or fairness. They do "not close their doors unless help would violate some funda-"mental principle of justice, some prevalent conception of good "morals, some deep-rooted tradition of the common weal."

It may be recalled that Article XVI of the League of Nations Covenant, 1919, recognized internationally what have been called "economic sanctions." I see no reason to condemn the Indian Regulation as a "political" law which this country would disregard. In my judgment, this court ought to recognize that in September/October, 1948, it was illegal for an Indian shipper to export jute fabrics from India where the ultimate destination was the Union of South Africa.

The vital question for consideration is whether that fact makes the contract sued on unenforceable. The defendants' case was advanced on the basis of the majority decision and the statements of the law in *Foster* v. *Driscoll*.[5] The three cases which were tried together in that action revealed a complicated set of facts relating to an attempt to load a cargo of whisky into a ship to be carried across the Atlantic and sold in the United States of America or on the high seas closely adjacent at some point from which it could easily be smuggled into the United States of America in violation of the laws of that country. Scrutton L.J. and Wright J., the trial judge, held that, as the whisky might have been sold in Canada or Nova Scotia or on the high seas without any breach by the parties of the law of the United States against the importation of alcohol, the agreement or the scheme of the parties was valid; but the majority of the Court of Appeal, Lawrence and Sankey L.JJ., held that the facts established an illegal joint adventure which our courts would not enforce.

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[4] (1918) 224 N.Y. 99.

[5] [1929] 1 K.B. 470; 45 T.L.R. 185.

Sankey L.J. (later Lord Chancellor) said[6]: "In my view, "the present position of the law is that the mere fact that a "vendor of goods knows that the purchaser proposes to run "them into a country where they are prohibited by some revenue "law is not sufficient to render the contract of sale illegal, but "if beyond mere knowledge the vendor actively engages in an "adventure to get the goods into such country, the court will "not assist the parties to the adventure by entertaining or "settling any dispute between the parties arising out of the "contract. Even if these principles as to revenue laws are to "stand, I can see no ground for extending them, as it seems "to me we must if we decide in favour of the present appellant "or, indeed, for holding that they are applicable to the facts "of the present case. Two facts differentiate the present case: "(1) The American law which it was proposed to infringe in "the present case was no mere revenue law; it was intended to "prevent a malum in se rather than a malum prohibitum. (2) "The parties concerned have taken an active part in the adven-"ture, a distinction which the court dwelt upon in *Pellecat* v. "*Angell*.[7] I can find no case which compels this court to hold "that it must or ought to entertain a dispute upon a contract "made between parties to further an adventure to break the "laws of a foreign State, which as above pointed out are not "mere revenue laws. It is true that such a contract has not "been made illegal by any English statute, nor does it subject "persons making such a contract to the penalties provided, for "example, in cases which come under the Foreign Enlistment "Act, but none the less I think that the courts of this country "are not bound to entertain such actions in view of the obliga-"tions of international comity, as now understood." Sankey L.J. said[8]: "To sum up, in my view an English contract should "and will be held invalid on account of illegality if the real "object and intention of the parties necessitates them joining "in an endeavour to perform in a foreign and friendly country

[6] [1929] 1 K.B. 470, 518.

[7] (1835) 2 Cr.M. & R. 311.

[8] [1929] 1 K.B. 470, 521.

"some act which is illegal by the law of such country notwith-"standing the fact that there may be, in a certain event, alter-"native modes or places of performing which permit the contract "to be performed legally."

I now read an extract from the judgment of Scrutton L.J.[9]: "The main contract is for the sale of whisky in the British "Isles between British subjects for a price to be paid by bills "in England. There seems no doubt that this by itself is legal "and that the fact that the seller knows the buyer intends to "smuggle the goods into the United States does not make it "illegal; see *per* Lord Mansfield in *Holman* v. *Johnson*,[10] where "the seller in Dunkirk knew that the buyer intended to smuggle "the goods into England. In this case Lord Mansfield declined "to give effect to the laws of his own country. It is different "where the seller, besides knowing the purpose, assists in the "purpose, as in *Clugas* v. *Penaluna*,[11] where the seller in "Guernsey packed the goods in such a way as to assist "smuggling into England, and Buller J. made this assistance, "and Grose J. the collusion, the ground of their decision. I "have no doubt that if seller and buyer agreed to ship the "whisky into the United States contrary to the laws of that "country the contract would not be enforced here: *Ralli's* case,[12] "not because it was illegal here but as a matter of public policy "based on international comity. On the other hand, if the "adventure was to import into Canada and there sell to some "person with the knowledge that he was going to import into "the United States, I do not think, following Lord Mansfield's "decision, that the courts would treat this as contrary to public "policy."

Both sides claimed support from the later case of *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft*,[13] in which it was held that since the contract was to be performed in England it was enforceable in the English courts, even although its performance might involve a breach by the defendants of the law of Hungary. No question of any performance of the contract in Hungary arose. It was a contract to do something in England. Apart from robust emphasis that it is an elementary principle of English law that people should keep their contracts and carry them out, I do not think that the case has any bearing on the present controversy.

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[9] [1929] 1 K.B. 495.

[10] (1775) 1 Cowp. 341.

[11] (1791) 4 T.R. 466.

[12] [1920] 2 K.B. 287.

[13] [1939] 2 K.B. 678; 55 T.L.R. 814; [1939] 3 All E.R. 38.

For the plaintiff reliance was placed on *Twentsche Overseas Trading Co. Ltd.* v. *Uganda Sugar Factory Ltd.*,[14] but that case was decided by the Judicial Committee of the Privy Council on the basis that the parties did not contract on the footing or common assumption that the goods sold would come only from Germany. If the correct view of the present case is that the parties did not contract on the footing or common assumption that the jute bags were to come from India, then the contract did not necessitate any violation of the law of India and no question arises. If, on the other hand, the contrary is the position, the *Twentsche* case[14] is clearly distinguished.

The meeting at Zurich in 1947 was important. The success of the business venture contemplated at that meeting depended on Mr. B. L. Sethia, through the defendant company (which he then appeared to control, or at least of which he was an active director), obtaining supplies of jute bags from Indian shippers so that they could be resold to South Africa. The fulfilment of the contract sued on by the plaintiff involved to the knowledge and intention of both the parties a violation of the law of India prohibiting their export. The correspondence reveals that the nature of the transaction was fully understood; it was not regarded as very creditable; its " difficulties " were fully recognized. But the profits to be obtained were high. They were established by the very restriction which the parties were seeking to have broken by some shipper and were to be achieved only by the shipper's success in deluding the Indian Control.

In my opinion, this transaction falls into a similar category to that of the whisky running to the United States of America during the time of the prohibition there and in violation of the laws of the United States (*Foster* v. *Driscoll*[15]). There the venture was to get a prohibited commodity into the United States by finding someone, when the cargo was sufficiently close to the coast, to take or smuggle it into the country and so earn high profits. Here the venture was dependent on someone getting out of the country the prohibited commodity which would fulfil this contract and enable the plaintiff in his turn to steal a march on lawful traders and make his profit out of the urgent demand of South Africa for jute bags.

The trial judge, Wright J., and Scrutton L.J. in the whisky case thought that the whisky might have been lawfully sold to Canada and would have upheld the agreement as it could have been lawfully performed. In the present case I find that there was, in effect, no chance of the contract being fulfilled unless the jute bags escaped the Indian Control, and no intention that it should be otherwise carried out.

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[14] (1944) 172 L.T. 163.

[15] [1929] 1 K.B. 470.

It may be that to hold a contract unenforceable because it takes advantage of a situation such as this cannot be taken too far. It could be said that the plaintiff did not actively engage to get the goods out of India, that he left that to the defendants, and that he was a mere buyer with knowledge of the origin of the goods and of the prohibition which, having regard to their ultimate destination, attached to them. That view might be said to be supported by the passage in the judgment of Sankey L.J. in *Foster's* case,[16] which I have cited above, but, quite apart from its application only to revenue laws, the facts of this case, as I have found them, go, I think, beyond the circumstances contemplated in that passage, the whole transaction here emanating, as it did, from the original agreement in Zurich and being a fulfilment of it. Those discussions left it to the defendants to find a way of getting the goods out of India in face of the control, and to provide the plaintiff as buyer with the means of reaping the reward of their success. In my judgment, this contract to the knowledge of both parties at the time of contracting, could not in fact have been performed without the performance in a foreign and friendly country of an act which was illegal by the law of that country, and I must hold the contract to be invalid and unenforceable.

As I am finding in favour of the defendants, I do not propose to lengthen this judgment to any great extent by dealing in detail with the questions raised on the issue of damages. They were much discussed at the trial, and Dr. Mann, a German lawyer, gave evidence of German law. The submission made by the defendants was that the plaintiff should in any event have mitigated the damages arising from their refusal to deliver at Genoa by accepting their offer, on the next day, to deliver c.i.f. Hamburg, all other terms being the same. If I am right on the view I have taken of the Genoa contract, the same view would, of course, apply to the proposed shipment to Hamburg for transhipment to South Africa. But if I am wrong, then the question would arise whether the plaintiff should, acting reasonably, have accepted the substituted port. He refused it outright, and I am not disposed to find that the defendants would not have been ready and willing and able to ship if he had accepted. The

[16] [1929] 1 K.B. 470, 518.

defendants, however, refused to guarantee reshipment at Hamburg, and, I think, not without good reason. There is evidence which indicates that reshipment might have been achieved, but on the whole I think that the difficulties and uncertainties were so great and the position so obscure that it was reasonable for the plaintiff not to accept the offer. A handsome profit awaited him, and if Hamburg had offered any reasonable prospect of success I think that he would have taken it rather than rely on a law suit to compensate him for his loss, although he appears to have been somewhat indignant that the performance of the contract was at once refused by the defandants and to have shown no desire to consider any alternative.

Difficulties arise also with regard to the figures of the claim having regard to the monetary currencies which would have been involved in the transaction and in regard to some of the items to be taken into consideration. I would not have dealt with those without further argument, and I make no findings in respect of them. There will be judgment for the defendants.

Judgment for the defendants.

J. F. L.

The plaintiff appealed.

Neil Lawson Q.C. and *E. J. Cohn* for the plaintiff. (1) The defence of illegality can only succeed when the contract for its performance necessitates or requires a party to the contract to do an act in a foreign country which it is unlawful for him to do by the foreign local law. (2) In the case of joint ventures that defence can succeed where the object of the venture is to perform a wrongful act (e.g., the distinction made in *Foster* v. *Driscoll* [1] between mala in se and mala prohibita), and where therefore that object can only be attained by an unlawful act on the part of the joint venturers or one of them: *Foster* v. *Driscoll* [1] (on the assumption that that case was rightly decided, which is arguable). (3) The Indian law which is here concerned is a law of a character which the English courts will not recognize; it is a law which falls into the categorization of penal, revenue or political laws. It has certain of the characteristics of penalties and revenue law, for obviously the object of the Sea Customs Act, under which the regulation is made, is to provide revenue. But really it is political law that is in question.

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[1] [1929] 1 K.B. 470.

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There is very little authority on the precise significance of the expression "political laws," although it is used in cases and in textbooks, apart from confiscatory legislation like the Nazi legislation of Germany and Austria. If it is permissible to use the word "political" in this connexion it means a law of this kind which is a purely political law.

[BIRKETT L.J. Surely all laws are political.]

What is meant is a case like *Emperor of Austria* v. *Day and Kossuth.*[2] This is a piece of legislation in India which is not relating to matters of property at all but to the behaviour of persons subject to the Indian legislation in their trade relationships with another country for political purposes. It is part of a blockade or an attempt to blockade South Africa so far as Indian goods are concerned. That is a political law, and the courts do not enforce political laws, not because they do not approve of them but because they say "This is something which strictly pertains "to the political relationships between the State and its citizens "and it has nothing to do with contracts such as this." The onus is on the defendants to establish their excuse for not performing their contract; there is a basic principle that parties should adhere to their bargains.

Reverting to the first proposition, that the performance of the contract requires the performance of an act by a party to the contract in a foreign country which is unlawful by local law, the cases start with *Holman* v. *Johnson,*[3] which was concerned with a sale of tea in Dunkirk which the parties knew was to be smuggled into England; nevertheless Lord Mansfield C.J. held the contract to be enforceable; that case was referred to with approval by the House of Lords in *Government of India* v. *Taylor.*[4] In *Biggs* v. *Lawrence*[5] goods sold in Guernsey were packed in a particular way so as to facilitate smuggling into England; it was held that the seller could not recover; *Clugas* v. *Penaluna*[6] was a similar case. *Hodgson* v. *Temple*[7] shows that the mere knowledge of the seller that the buyer will make an illegal use of the goods does not disentitle him to recover; see also *Pellecat* v. *Angell*[8] and *Sharp* v. *Taylor.*[9] In *Ex parte Chavasse*[10] it was held that a contract between neutrals involving blockade running during the

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[2] (1861) 3 De G.F. & J. 217.

[3] (1775) 1 Cowp. 341.

[4] [1955] A.C. 491; [1955] 1 All E.R. 292.

[5] (1789) 3 Term Rep. 454.

[6] (1791) 4 Term Rep. 466.

[7] (1813) 5 Taunt. 181.

[8] (1835) 2 Cr.M. & R. 311.

[9] (1849) 2 Phillips 801.

[10] (1865) 34 L.J.Bk. 17.

American Civil War was enforceable; see also *The Helen* [11] and *Fracis, Times & Co.* v. *Sea Insurance Co.*[12]

This legislation is an unfriendly act directed by one State against the trade of another State with which it is at peace; the courts will examine the motive behind legislation so as to see whether it is of a kind which they will not enforce: *Frankfurther* v. *W. L. Exner Ltd.*[13]

The contract in *Ralli Brothers* v. *Compania Naviera Sota y Aznar* [14] involved the making in Spain by a party to the contract of a payment which was illegal by Spanish law, and it was held that the contract was unenforceable in so far as it was illegal; contrast *Kleinwort Sons & Co.* v. *Ungarische Baumwolle A.-G.*,[15] where a contract to be performed in England was held to be enforceable, although its performance might involve a breach of Hungarian law. Those cases illustrate the difference in principle between acts to be carried out in the country where they are illegal and acts to be carried out elsewhere; the terms of the present contract do not require the defendants to do anything in India. [*In re Claim by Helbert Wagg & Co. Ltd.*[16] was also referred to.]

The defendants relied on *Foster* v. *Driscoll.*[17] In that case the parties, in the view of the majority of the court, agreed to do an act contrary to the laws of the United States, whereas in the present case the contract does not require any illegal act on the part of any party; gunnies may be bought elsewhere than in India and shipped to a place other than South Africa, and in any case it is not right to go outside the framework of the contract to inquire what may be done before or after its performance. In *British Nylon Spinners Ltd.* v. *Imperial Chemical Industries Ltd.*[18] the principle in *Foster* v. *Driscoll* [19] was not applied, as the plaintiffs had no concern with the contracts and legislation which formed the background of the case.

In the performance of the contract there was no obligation on the plaintiff to re-ship to South Africa, or, indeed, anywhere. He might have sold the goods in Italy, or shipped them to any suitable market. There was equally no obligation on the defendants to ship goods from India; they were not tied to any source of origin. The plaintiff must show that the defendants were required to do an unlawful act. If any unlawful act was done it would be done by the shippers from India; there is no suggestion that they had any unlawful intention, and they were not the agents of the defendants. It is much the same as a case of contraband in time of war, when neutrals are not affected with illegality but lose their goods if they are seized by a belligerent. There was evidence that in certain cases indirect shipments were allowed if paid for in hard currencies; it would be accordingly wrong to assume that in every case the Chief Customs Officer would intervene. To make the prohibition apply to the acts of the parties themselves would be to give it extraterritorial effect, which, according to the evidence, the Indian Government does not claim. To satisfy the tests laid down by the authorities the defendants must establish that the terms of the contract absolutely require that one or other or both of the parties shall do something in India which is illegal by Indian law; that they have failed to do.

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[11] (1865) L.R. 1 A. & E. 1.

[12] (1898) 3 Com.Cas. 229.

[13] [1947] Ch. 629.

[14] [1920] 2 K.B. 287.

[15] [1939] 2 K.B. 678.

[16] [1956] Ch. 323; [1956] 1 All E.R. 129.

[17] [1929] 1 K.B. 470.

[18] [1955] Ch. 37; [1954] 3 All E.R. 88.

[19] [1929] 1 K.B. 470.

The plaintiff's second contention is that the law in question is not of a type to which the courts will pay regard. The principle is stated in Dicey's Conflict of Laws, 6th ed., at p. 152, where rule 22 indicates that the courts cannot entertain an action for the enforcement, either directly or indirectly, of a penal, revenue, or political law of a foreign State.

The authorities show that the foreign laws which will be enforced in our courts are those dealing with proprietary rights, in so far as they have intraterritorial effect. Political laws, in contrast, are those which affect the political relationships of a State and its subjects. The principles are illustrated by *Emperor of Austria* v. *Day and Kossuth*,[20] where the defendants were restrained from circulating spurious Hungarian notes, not because the Emperor's political prerogatives were infringed, but because his government was receiving financial damage.

[DENNING L.J. Every law is in some way a political law; the expression is too wide for anyone to define. It is not so with penal or revenue laws.]

The cases dealing with revenue and penal laws show that the courts disregard them because they do not purport to deal with proprietary rights but affect the relationship of the States concerned with their citizens inside their territories.

The Act and regulations in the present case have the characteristics of both penal and revenue legislation. They constitute an attempt by one State to impose a blockade on another. The best parallel is afforded by the blockade cases. There is no reason to distinguish between an economic blockade and a belligerent blockade; in neither case are neutrals precluded from bringing actions against each other in neutral courts regarding matters arising out of blockade-running transactions. [*Huntington* v. *Attrill*[21] and *Government of India, Ministry of Finance* (*Revenue Division*) v. *Taylor*[22] were also referred to.]

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[20] 3 De G.F. & J. 217.

A. A. Mocatta Q.C., *Richard Vick* and *Peter Kenworthy-Browne* for the defendants. This is a contract which the English courts will not enforce, though what the parties have done is not illegal by English law. It was the intention of the parties and the true effect of the contract that an act should be done in India which was illegal by Indian law, and the contract is unenforceable here for the reasons laid down in *Ralli Brothers* v. *Compania Naviera Sota y Aznar*[23] and *Foster* v. *Driscoll.*[24]

No question of penal or revenue or confiscatory law arises here under sections 19 and 134 and the regulations. On the true construction of the regulations both direct and indirect shipments are illegal except with the permission of the Chief Customs Officer, who is given no discretion in the matter. If he had known of the intentions of the parties in the present case he would certainly have stopped the shipment. There was no evidence that the Indian Government were in any way turning a blind eye on such shipments; the evidence was the other way, that they were becoming increasingly suspicious of shipments to ports such as Genoa. The regulation takes effect at the time of shipment, and there is illegality whether or not the actual shipper knows that the consignees are intending to re-ship to South Africa; the case, accordingly, falls within the principle in *Foster* v. *Driscoll*,[25] as the judge held.

That case should not be regarded as a decision based on the fact that there was a partnership. If there was an agreement to get the goods out of India and into South Africa for the benefit of both parties, all the elements which were present in that case in the view of the majority of the court are present also in the present case. [*Waugh* v. *Morris*[26] was referred to.]

A second ground of objection is that performance of the contract made it necessary for the defendants to do something unlawful by Indian law: see the *Ralli*[27] and *Kleinwort*[28] cases.

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[21] [1893] A.C. 150; 8 T.L.R. 341.

[22] [1955] A.C. 491; [1955] 1 All E.R. 292.

[23] [1920] 2 K.B. 287.

[24] [1929] 1 K.B. 470.

[25] Ibid.

[26] (1873) L.R. 8 Q.B. 202.

[27] [1920] 2 K.B. 287.

[28] [1939] 2 K.B. 678.

If the facts are, as they were, that the goods were unprocurable except from India, this contract could not be performed without a violation of Indian law. A c.i.f. seller must procure the shipment of the goods if he is to fulfil his contract: see *Johnson* v. *Taylor Bros. & Co. Ltd.*[29] Accordingly, the defendants must do or procure to be done something which was illegal. It is true that in *Ralli's* case[30] the contract expressly provided for the commission of an illegal act, while this contract does not; but there can be no distinction if it is impossible to fulfil it otherwise. [*In re Badische Co. Ltd.*[31] and *Twentsche Overseas Trading Co. Ltd.* v. *Uganda Sugar Factory Ltd.*[32] were referred to.]

With regard to penal and revenue laws, the rule is that the courts will not enforce them in this country at the suit of a foreign government: *Huntington* v. *Attrill.*[33] That is not to say that the courts will ignore them when considering whether the parties to an action have involved themselves in something unlawful. The question has been extensively reviewed in the Irish case of *Peter Buchanan Ltd. & Macharg* v. *McVey.*[34] Lord Mansfield went too far when he said in *Holman* v. *Johnson*[35] that the courts would take no notice of foreign penal or revenue laws. In any case no penal or revenue law is involved in this case, but in applying the principle in *Ralli's* case[36] it does not matter what the nature of the law is, because the illegal act is to be performed in the country concerned. The expression "political law" is ambiguous; the only authority for its use cited in Dicey is *Emperor of Austria* v. *Day and Kossuth,*[37] which does not establish any far-reaching principle at all. [Reference was also made to *Bank voor Handel en Scheepvaart* v. *Slatford.*[38]]

Lawson Q.C. in reply. The basis of the decision in *Foster* v. *Driscoll*[39] was that there was an agreement for a partnership in which all parties were joint venturers in the execution of a purpose unlawful under foreign law. In the present case there is no joint venture; it cannot be suggested that the defendants had anything to do with a resale to South Africa or that the plaintiff had anything to do with the procuring of goods from India.

[29] [1920] A.C. 144; 36 T.L.R. 62.

[30] [1920] 2 K.B. 287.

[31] [1921] 2 Ch. 331.

[32] (1944) 172 L.T. 163; [1945] W.N. 11.

[33] [1893] A.C. 150.

[34] [1955] A.C. 516n.

[35] 1 Cowp. 341, 343.

[36] [1920] 2 K.B. 287.

[37] 3 De G.F. & J. 217.

[38] [1953] 1 Q.B. 248, 279; [1952] 2 T.L.R. 861; [1952] 2 All E.R. 956.

[39] [1929] 1 K.B. 470.

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The authorities establish in general that, where a contract is made subject to English law, the court generally disregards foreign law though it may have some effect on what the parties propose to do. [*Kleinwort's* case[40] and *Trinidad Shipping and Trading Co. Ltd.* v. *G. R. Alston & Co.*[41] were referred to.] The exception is under the principle in *Ralli's* case,[42] which applies where an actual party is required to do an act in a foreign country which is unlawful there. The present contract required nothing of the kind; the defendants were not required to ship themselves or through an agent; a c.i.f. seller may fulfil his obligations by buying goods afloat: see *J. H. Vantol Ltd.* v. *Fairclough Dodd & Jones Ltd.*[43]

It is too narrow to confine the non-recognition of foreign penal and revenue laws to suits by the foreign State in question; Lord Mansfield's observations in *Holman* v. *Johnson*[44] have received approval from the House of Lords in *Government of India* v. *Taylor*,[45] a case which reinforces the idea of a "political" law.

[BIRKETT L.J. I would point out that the editors of the 6th edition of Dicey, in the preface at p. 14, disclaim that all the rules set out are well established and broad based; that applies with some force to the reference to "political" laws in rule 22.]

DENNING L.J. The Union of South Africa is a country with a tremendous problem—some say an insoluble problem—in regard to the races in her midst. Her attempts at a solution met with the disapproval of the Government of India. To mark its disapproval, the Government of India in 1946 put an embargo on the shipment of goods from India to South Africa. This embargo hit hard the trade in jute, particularly in jute sacks known in the trade as "B. twills." India was practically the only supplier of those sacks at that time; and South Africa was a large consumer of them and needed them for bagging her maize crop. In order to overcome the embargo, South Africa was prepared to pay very high prices for these sacks, and there were a number of middlemen ready to help her by one means or another, so long as the money reward was tempting enough. This case is a dispute between two of those middlemen.

Mr. Regazzoni, the plaintiff, is a Swiss citizen. From 1947 to 1951, he told the court, he had sold 10 to 12 million of these

[40] [1939] 2 K.B. 678.

[41] [1920] A.C. 888; 36 T.L.R. 654.

[42] [1920] 2 K.B. 287.

[43] [1955] 1 W.L.R. 642, 1302 (C.A.); [1955] 2 All E.R. 516; [1955] 3 All E.R. 750 (C.A.).

[44] 1 Cowp. 341, 343.

[45] [1955] A.C. 491.

bags a year to the South African Government, all for dollars. They were not shipped direct from India to South Africa, for that would be too plain a breach of the Indian law. He got them sent to a European port, such as Genoa, as if they were to be used in Europe, and then would tranship them to South Africa. He made transactions, he said, for millions of sacks via Genoa.

The transaction with which we are concerned is one of those transactions via Genoa. It came about in this way: In 1948 Mr. Regazzoni's agent, a Mr. Weil, met an Indian gentleman, Mr. Sethia, in Zurich. Mr. Sethia was a director of an English company, K. C. Sethia (1944) Ltd., which had close connexions with an Indian company of a similar name. Mr. Weil and Mr. Sethia discussed the possibility of transactions in jute bags from India. Mr. Sethia told Mr. Weil that if he (Mr. Sethia) had any part in sending goods to South Africa from India, whether directly or indirectly, and the Indian Government knew of it, he would be in difficulty. So he said he did not want to know "officially" what happened to the goods after they reached the nearest European port. His scruples were respected. A contract was made in 1948 between Mr. Weil, Mr. Regazzoni's agent, and a Mr. Raydt, who was the agent for K. C. Sethia (1944) Ltd., the English company, for the supply of half a million of these sacks, B. twills. It was made by telegram passing between Mr. Weil in Basle and Mr. Raydt in Hamburg, in the German language. Mr. Weil's telegram of September 4, 1948, read: "Accept"—that means "We will accept"—"500,000 new B. twills September October price 248 shillings "c.i.f. Genoa consignee Gattoni Milan"—Gattoni was a servant or nominee of Mr. Regazzoni—"Bank guarantee payment "against delivery of freight documents Dreyfus Bank Wire "agreement." By telegram of September 6, Mr. Raydt replied: "B. twills in order." The judge has held that thereupon there was a concluded contract for delivery of half a million sacks at 248s. for every 100, c.i.f. Genoa.

K. C. Sethia (1944) Ltd., the suppliers, did not fulfil that contract. We do not know the actual reason. It may be that Genoa had become suspect in the eyes of the Indian authorities, or it may be that Sethia Ltd. could sell better elsewhere. Whatever the reason, Sethia Ltd. did not fulfil the contract, and Mr. Regazzoni now sues them for damages for breach of it. He made an excursion into the German courts, without success. There was trouble about parties, and he failed. In 1954, when nearly six years had elapsed since the alleged breach, he brought this action in the English courts, claiming damages for failure to deliver the sacks in accordance with the contract. He claimed special damages because he said he had lost the profit which he would have made on the resale to South Africa, which was a resale in dollars. The judge has found that the price payable by Mr. Regazzoni to Sethia Ltd. was a high price, and the pleadings show that the profit on the resale to South Africa would be a high profit. The question is whether the contract will be enforced in these courts.

Both parties agree that the proper law of the contract is English law. It is said that the contract is unenforceable because there was an intention to break the Indian law in the matter. The Indian law was enacted on July 17, 1946, before India became independent. A regulation was made under the Sea Customs Act, 1878, by which the Government of India prohibited "the taking by sea or by land out of British India of "goods from whatever place arriving which are destined for "any port or place in the Union of South Africa or in respect of "which the Chief Customs Officer is satisfied that the goods, "although destined for a port or place outside the Union of "South Africa, are intended to be taken to the Union of South "Africa."

Upon the true construction of the regulation I think it prohibits shipments out of India, either directly to South Africa, or indirectly to South Africa, whenever South Africa is the ultimate destination of the goods. The second part enables the Chief Customs Officer to stop exports in cases where, although the ultimate destination may appear to be outside South Africa, nevertheless he is satisfied that they are intended to be taken to South Africa. Mr. Lawson asks us to hold that the Chief Customs Officer has an executive discretion, almost like a person who has a discretion whether to grant an export licence or not. I do not so read the regulation. I think there is an absolute prohibition against shipment direct or indirect from India to South Africa. Indeed, looking at the evidence and the correspondence in the case, there can be little doubt that the parties to this contract knew perfectly well that such shipment was illegal. When they spoke of "difficulties," the difficulties which they envisaged were getting over the prohibition of export from India. I need only read one illuminating paragraph in the letter of July 18, 1948, just before this contract was made, from Mr. Weil to Mr. Raydt: "As regards the B. twills business, I "know all the difficulties connected with this business. I "believe, however, that Sethia, as an Indian firm, are the very "firm to achieve something where other firms fail. When I "was together with Sethia in Zurich, we discussed these trans- "actions, and at that time he indicated that in this connexion "he could do some things which it would be impossible for "other firms to do. This was to be assumed from his price "quotations. . . . Let Mr. Sethia make use of his good con- "nexions, and make an offer in these sacks on the terms as "before."

It seems to me quite plain that these were middlemen attempting to overcome "difficulties," as they called them; but what they were in fact attempting to overcome was the prohibition by Indian law of shipment direct or indirect from India to South Africa.

Now, what is the law upon this matter? I quite agree that on looking at the terms of this contract by itself, there is nothing that necessitates or requires either party to do an act which is illegal by the law of any country. It is possible that the contract might lawfully have been fulfilled, for example, by Sethia Ltd. getting the goods from somewhere else other than India, or by buying them on board ship, or by Mr. Regazzoni not sending them to South Africa. All that is possible. I do not see, therefore, that this case can be brought within the case of *Ralli Brothers* v. *Compania Naviera Sota y Aznar*[1]; because there is nothing in the stated terms of this contract which compels the performance of an act illegal in the country where it is to be performed. But that is not the sole ground on which these courts will refuse to enforce a contract. The cases starting from *Biggs* v. *Lawrence*[2] and finishing with *Foster* v. *Driscoll*,[3] show that if two persons agree together on a transaction which to their knowledge is intended to be carried out by means of one or other of them breaking the laws of a friendly country, or procuring or assisting another person in the breach of such laws, then the courts of this country will not lend their aid to the enforcement of the transaction. The reason is because it would be a breach of the comity which should exist between countries, and especially between countries of the British Commonwealth. The courts of one country should not help to break the laws of another. The transaction may not on the face of it disclose any illegal intention. The parties will usually take steps not to let any illegality appear. They will execute a contract for the sale of goods, or for the purchase of a steamer, or such like, which does not actually necessitate the performance of an illegal act, hoping thereby to validate the transaction and make it enforceable. But the court is not to be hoodwinked by subterfuges of that kind. Once it appears that, in order to implement the transaction, one of the parties to the knowledge of the other, intends to break or to assist in breaking the laws of a friendly country or to get some one else to do it, then it will not be enforced.

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[1] [1920] 2 K.B. 287; sub nom. *Sota y Aznar* v. *Ralli Brothers*, 36 T.L.R. 456.

[2] (1789) 3 Term Rep. 454.

[3] [1929] 1 K.B. 470; 45 T.L.R. 185.

Holman v. *Johnson*[4] is quite distinguishable, because there the sale of the tea at Dunkirk was complete before anything illegal was done or intended to be done by anyone: but where the transaction is not complete, where both parties contemplate that, in order to complete it, one or other of them, or some one on their behalf, will do something to break or to assist in breaking the laws of a friendly country, then in my judgment these courts will not enforce it.

Mr. Lawson urged us to hold that this legislation by the Government of India was an act of retaliation directed against South Africa, an economic sanction imposed because of the racial policy of South Africa, a political law of which, he says, the courts should take no notice. He referred us to the observations of Lord Mansfield in *Holman* v. *Johnson*, where he says,[5] "no "country ever takes notice of the revenue laws of another." Mr. Lawson says that has been applied to penal laws, and should extend also to political laws. It seems to me that Lord Mansfield goes too far when he says that these courts will *take no notice* of such laws. It is perfectly true that the courts of this country will not enforce the revenue laws or the criminal laws of another country at the suit of that other country, either directly or indirectly. These courts do not sit to collect taxes for another country or to inflict punishments for it; and this is so even between countries of the Commonwealth, as the House of Lords held in the *Government of India* v. *Taylor*.[6] These courts will not enforce such laws at the instance of the foreign country. It is quite another matter to say that we will take no notice of them. It seems to me that we should take notice of the laws of a friendly country, even if they are revenue laws or penal laws or political laws, however they may be described, at least, to this extent, that if two people knowingly agree together to break the laws of a friendly country or to procure some one else to break them or to assist in the doing of it, then they cannot ask this court to give its aid to the enforcement of their agreement.

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[4] (1775) 1 Cowp. 341.

[5] Ibid. 343.

[6] [1955] A.C. 491; [1955] 2 W.L.R. 303; [1955] 1 All E.R. 292.

In *Foster* v. *Driscoll*[7] people tried to smuggle whisky into the United States in breach of the prohibition laws. They were not allowed to come to these courts for assistance to settle their differences. So, too, these middlemen, who were engaged in trying to break the export laws of India, must settle their differences between themselves as best they may. They cannot come to our courts for assistance.

I would, therefore, dismiss the appeal.

BIRKETT L.J. I am of the same opinion. I have felt as the case has been proceeding that the real question for determination here can be simply stated: will an English court enforce a contract of the nature of this contract as disclosed in the evidence? I think we were fortunate in this, that the questions of fact have not really presented very much difficulty. I know that Mr. Lawson has most zealously contended for a certain view to be taken of the facts which have been disclosed, but for my own part I think that there can be no doubt whatever that the real view to be taken of the facts in this case was that taken by Sellers J. One cannot read the evidence of the witnesses or the correspondence without being driven inevitably to the conclusion that the genesis of this contract with which we are concerned was: how can we best overcome the prohibition or ban which has been laid upon the export of these bags from India to South Africa? I do not propose to go into it; my Lord has indicated in outline what it was.

There was, of course, the preliminary meeting in Zurich to which the judge in the court below paid great attention, and I think quite rightly and properly so—it is the foundation of the whole thing—where Mr. B. L. Sethia, who was unfortunately not able to give evidence at the trial, discussed there with Mr. Weil, the agent for the plaintiff in this case, in the presence of Mr. Wild, the interpreter, that simple question, how they were to get over these particular difficulties.

[His Lordship referred to certain evidence concerning the meeting at Zurich, and continued:] I think that it is absolutely plain that from the beginning it was clear to both parties to this contract that what the contract was to do was to take Indian jute bags and to get them from India to South Africa, that is to say, that it was known—first of all, it was most plainly and clearly known—that the ban operated against any direct shipment. Mr. Sethia himself said: "I cannot do it directly; there "is a ban about that; with regard to my sending them to "Genoa or other European port, I can do that; but, of course, "if they are going to South Africa, you had better not tell "me." It is quite plain that the whole discussion was as to how to get them to South Africa; and when the judge dealt with these matters, after discussing one of the points raised in the court below, whether there was a binding contract, he said this: "Having regard to the further issues which have to be determined, a meeting prior to this contract between Mr. B. L. "Sethia, a director of the defendant company at the time, "Mr. Weil and Mr. Raydt (with a Mr. Wild as an interpreter) "is of importance. The precise date is uncertain, but the "meeting was probably in 1948, before August of that year when "India became independent." And then he said what the discussion was, and added this: "I feel no doubt that the meeting "at Zurich was for the purpose of finding a way to take advantage of this situation"—namely, the ban upon Indian jute bags, the demand by South Africa for jute bags, and the consequent higher prices that could be obtained in that situation. "Mr. "Sethia is an Indian and the defendant company were in touch "with Indian shippers of the same name, Sethia, relations of "the defendants' directors but I understand trading as a "separate company." He added[8]: "I am clearly of opinion "that both of the parties were well aware of the restrictions "and that it would have been unlawful for the shipper to export "directly or indirectly to South Africa." Later on[9]: "Both "parties to this contract contemplated and intended that the "contract goods would be shipped from India and be made "available in Genoa so that the plaintiff might make a resale "or fulfil a bargain of resale to the South African buying agency. "That had been decided generally by the agents and Mr. B. L. "Sethia at Zurich. Not only was India the source of supply "discussed then, but that India was to be the source of supply "was indicated by the high price, although that is not "conclusive."

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[7] [1929] 1 K.B. 470.

It is also supported by the evidence of Mr. Young that at the time of the contract India would have been the only source of supply for a contract of half a million bags for fairly prompt delivery and not spread over a very long time. Therefore, I think that we have been rather fortunate in this, that it has not been very difficult to come to a conclusion about what the nature of the contract was, despite the vigorous argument of Mr. Neil Lawson, and I am entirely of the same view as the judge in the court below, that from the beginning and all the way through the intent of this contract was to get round the prohibition, which was a prohibition against direct and indirect shipment.

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[8] Ante 498.

[9] Ibid.

That is all that I want to say about the facts. I would like to say a word about the regulation. I think that it is important to notice that it was a regulation made by the Department of Commerce in exercise of the powers given by section 19 of the Sea Customs Act, 1878, and therefore the Central Government made this decree. It is important to notice, first of all, that there is a prohibition against bringing into India, either by sea or land, goods which have been consigned from, or grown, produced or manufactured in the Union of South Africa; and then there are certain exceptions: if the goods have been processed in other countries, if the value of the processing reaches a certain mark, then the ban is not to apply, and so on. That is the first point; and then the matter with which we are concerned: "(*b*) to prohibit the taking by sea or by land out of British India of goods from whatever place arriving which are destined for any port or place in the Union of South Africa. . . ."

Let me stop there, as though there were a semi-colon. The word "destined" there most plainly does not mean just consigned. I think it means, and I think the whole purport of (*b*) means, goods which are to have as their final destination South Africa; and it is, first of all, a prohibition: "You shall not ship goods to South Africa." There is nothing said there about transhipment, at that particular point. Then: "or in respect of which the Chief Customs Officer is satisfied that the goods although destined for a port or place outside the Union of South Africa are intended to be taken to the Union of South Africa." Of course, there "destined" cannot have quite the same meaning as in the first place, if "destined" has reference to ultimate place of destination. But I think that the sense is quite plain: "What we seek to prohibit is an export of goods to South Africa, and we want to do it both directly and indirectly. Directly, there is no problem; we merely say it cannot be done; but, of course, we recognize that there are all sorts of ways by which indirectly our purposes may be defeated: you

" may send them to European ports "; and, therefore, there is a provision there that if goods, for example, are being sent to Genoa, but the real destination is a port in South Africa, then if the Chief Customs Officer is satisfied that that is the situation, the ban applies.

And then, when it comes to a question of transhipment: " (*a*) to prohibit the transhipment at any port in British India " of goods when destined for any port in the Union of South " Africa "—again dealing with the direct shipment—" and (*b*) to " prohibit the transhipment at any port in British India of goods " when destined for any port other than a port in the Union of " South Africa, save with the permission of the Chief Customs " Officer who shall not grant such permission unless he is satisfied " that it is not intended that such goods shall be taken to the " Union of South Africa."

I take the whole purpose of that legislation to be: " We " want to prohibit and do prohibit the direct and the indirect " export of Indian goods to South Africa."

This is, of course, a matter of inference, but I think it is a matter of reasonable inference: a year later, in June, 1947, the original legislation being in July, 1946, there is a fresh notice with regard to the shippers of jute and jute goods; they " are " informed that in future direct shipments only will be allowed " to all territories which have a seaboard of their own and enjoy " direct shipping facilities. In cases in which direct shipments " are impracticable necessitating shipment via an intermediate " port, such as Aden and Port Said, shipments will be permitted " only on the condition that shippers enter into a bond under- " taking to produce within three months or such extended period " as the Export Control authority may grant, a certificate of " landing from the Government of the country of final destina- " tion to the effect that the consignments in question had " reached the ultimate destination. Failure to produce such a " certificate within the stipulated time will render the shipper " concerned liable to penal action."

That is a year later, and the inference I draw from it is that the efforts to control the indirect shipment into South Africa had not been as successful as the Government of India hoped, and they, therefore, introduced this new legislation in order to tighten up those restrictions; but I am quite satisfied, for my own part, that the Indian legislation was to the effect that there was a ban on the sending of Indian goods directly or indirectly to South Africa, as the judge in fact found in this case.

I think that the present case is really governed by the principle laid down by the majority of this court in *Foster* v *Driscoll*,[10] and the only other point on which I want to say one word is the submission that this was a political law, that the English courts therefore ought to take no notice of it, and so on. We have had cited to us the passage from Dicey upon it, and this argument has really turned, as I ventured to point out, on the words in the preface, which I think have some bearing on the matter, dealing with the way in which this rule 22,[11] with which we are dealing, should be considered, and I need not repeat them; they are in the preface to Dicey. But, for my own part, I find it very difficult to understand what is intended by the use of this word "political" with regard to legislation. The authorities that are cited in Dicey do not seem to carry the matter much further; certainly they have no application to this case. All legislation may properly be called "political legislation." Every Act which is passed by the House of Commons and by the Lords is in that sense "political legislation." One can understand "revenue "legislation," "revenue law," "confiscatory law," "penal "law." Those are all clearly defined; but the expression "political law" seems to me to be so vague that it is really very difficult to attach to it any special or particular meaning. For my own part, I am satisfied with regard to this particular legislation as to South Africa, however it is to be described, that none of the principles which apply to revenue, penal or confiscatory law apply in this case. I agree with what my Lord has said, that it is wrong to say that one shall take no notice of laws of this kind, as distinct from saying that one shall not enforce such laws. But the view that I take of the whole case here, particularly when I recall the facts upon which the contract was based, really turns upon the principle which was enunciated here by my Lord, that where there are two parties to the contract and the real basis of the making of the contract is that one party or both will break the law of a friendly country, then in that case the matter is one in which for convenience' sake the contract may be said to be an illegal contract, and this court will not enforce it. Particularly is that so when we are dealing with a friendly country within the British Commonwealth.

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[10] [1929] 1 K.B. 470.

[11] Dicey's Conflict of Laws, 6th ed., p. 152: "The Court has no juris-"diction at common law to entertain "an action (1) for the enforcement, "either directly or indirectly, of a "penal, revenue, or political law of a "foreign State."

For these reasons I am of the opinion that the judge below came to a right conclusion; I agree with his judgment; I agree with the judgment of my Lord, and I think this appeal ought to be dismissed.

PARKER L.J. I also agree. I think that this case depends entirely, as indeed did *Foster* v. *Driscoll*,[12] on the true view of the facts. There are four relevant findings by the judge. First, he said: "In my judgment, this court ought to recognize that "in September/October, 1948, it was illegal for an Indian "shipper to export jute fabrics from India where the ultimate "destination was the Union of South Africa." Secondly[13]: "I am clearly of opinion that both of the parties were well aware "of the restrictions and that it would have been unlawful for "the shipper to export directly or indirectly to South Africa." The third is the passage to which Birkett L.J. has referred[14]: "Both parties to this contract contemplated and intended that "the contract goods would be shipped from India and be made "available in Genoa so that the plaintiff might make a resale "or fulfil a bargain of resale to the South African buying "agency." And, lastly,[15] that "India would have been the only "source of supply for a contract of 500,000 bags for fairly "prompt delivery and not spread over a very long time." To those findings I might add an admission made by Mr. Lawson in the course of the appeal to the effect that both parties knew that the goods were destined for South Africa.

Some of those findings were challenged by Mr. Lawson in this court. In particular, it was said that it had not been established that Indian law prohibited indirect shipments to South Africa. It was also said that on a true view of the evidence, the contract could have been performed in a way which was perfectly legal and would not offend against the Indian law. Without going through the evidence in detail, it seems to me that those findings of fact of the judge are amply justified, and I entirely agree with the conclusion at which he arrived, where he said[16]: "In my judgment, this contract to the knowledge of both parties at the time of contracting, could not in "fact have been performed without the performance in a foreign "and friendly country of an act which was illegal by the law of "that country, and I must hold the contract to be invalid and "unenforceable."

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[12] [1929] 1 K.B. 470.

[13] Ante 498.

[14] Ibid.

[15] Ante 498–499.

[16] Ante 504.

The only findings as to which I have had any doubt in the course of the case are, first, as to the true effect of Indian law; and, secondly, as to the knowledge of the parties as to the Indian law. That an evasion of Indian law was contemplated and intended is perfectly clear. The parties intended a shipment on the face of it to Genoa in order to prevent disclosure that South Africa was the ultimate destination; but it is said that that would involve not a breach of Indian law but merely an evasion of it. Whether it is a breach or not, of course, depends upon the true construction to be given to the Indian law. For myself, I think that on a proper construction of the Indian law shipment to Genoa with a view to transhipment to South Africa was a breach of that regulation. It was, I think, illegal under Indian law, whether or not the Customs Officer was suspicious or expressed satisfaction that, notwithstanding that it was apparently being sent to Genoa, the ultimate destination was South Africa. Further, I think that that was the knowledge of the parties at the meeting in Zurich in 1947, or, I think, as it was corrected later, in the summer of 1948. It is perfectly true that in regard to indirect shipments, as opposed to direct shipments, to South Africa, reference was made to " difficulties " as opposed to illegality; but I am perfectly satisfied, reading the evidence as a whole, and also reading the views of the parties as expressed in the correspondence, that they full well knew that a breach of Indian law would be involved.

Now, that being so, on those findings it seems to me perfectly clear that, although looking at the contract alone, it might have been performed in a perfectly legal way, yet there has been proved by these facts the " wicked intention " to which Blackburn J. referred in *Waugh* v. *Morris* [17]; he said: " We quite agree, that, " where a contract is to do a thing which cannot be performed " without a violation of the law it is void, whether the parties " knew the law or not. But we think, that in order to void a " contract which can be legally performed, on the ground that " there was an intention to perform it in an illegal manner, it is " necessary to show that there was the wicked intention to break " the law; and, if this be so, the knowledge of what the law is " becomes of great importance."

Now, once that " wicked intention " there referred to by Blackburn J. is proved, as I think it clearly was in this case, it seems to me that the case falls fairly and squarely within the principle enunciated in *Foster* v. *Driscoll*.[18] Sankey L.J. said

[17] (1873) L.R. 8 Q.B. 202, 208.

[18] [1929] 1 K.B. 470.

this [19]: "To sum up, in my view an English contract should "and will be held invalid on acount of illegality if the real object "and intention of the parties necessitates them joining in an "endeavour to perform in a foreign and friendly country some "act which is illegal by the law of such country notwithstanding "the fact that there may be, in a certain event, alternative "modes or places of performing which permit the contract to be "performed legally."

Lawrence L.J. said this [20]: "The ground upon which I rest "my judgment that such a partnership is illegal is that its recognition by our courts would furnish a just cause for complaint "by the United States Government against our Government (of "which the partners are subjects), and would be contrary to our "obligation of international comity as now understood and "recognized, and therefore would offend against our notions of "public morality."

It is true that Scrutton L.J. dissented; it is perfectly clear that he dissented merely on his reading of the particular facts in that case. He quoted the passage from Blackburn J. to which I have already referred; and if he had taken the same view of the facts as the other members of the court, he would have found, I think, that the "wicked intention" had been proved and would have held as did Lawrence L.J. and Sankey L.J. Thus, at the very opening of his judgment, Scrutton L.J. said this [21]: "While I should like to arrive at the same result, "I think that on legal principles, as the adventure could be "carried out lawfully or unlawfully, and the parties have not "agreed how to carry it out, the courts can deal with the legal "results as if it were carried out lawfully." And again he said this [22]: "The adventure, it appears to me, could be carried out "in a legal way and could be carried out in an illegal way, and "the adventurers had not bound themselves to either way." In other words, his reading of the facts was such that the "wicked "intention" referred to by Blackburn J. had not been proved.

Taking that view of the matter, it is unnecessary for me to express any opinion upon the alternative way in which Mr. Mocatta put the case, based on *Ralli's* case.[23] It is sufficient to say that in my view if the appeal were to be upheld on that ground, it would involve an extension of the principle in *Ralli's*

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[19] [1929] 1 K.B. 470, 521.
[20] Ibid. 510.
[21] Ibid. 484.
[22] Ibid. 497.
[23] [1920] 2 K.B. 287.

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case in that here, so far as the contract documents are concerned, the contract could be performed legally.

Finally, Mr. Lawson took the point that the Indian law was a revenue, penal or political law, to which the courts of this country will pay no attention. It is clearly in my view not a penal or a revenue law, and I share the difficulty to which my Lords have referred as to what in this connexion is meant by a political law. I have not discovered how the word "political" first crept into the rule referred to in Dicey, and it may be that it is merely dealing with the case of a foreign sovereign seeking to enforce some prerogative or sovereign right. Be that as it may, it seems to me that in this case, whether it can be classed as a penal, revenue or political law or not, this is not a case in which such a law is sought to be enforced either directly or indirectly. What is being done here, as it seems to me, is to ascertain whether performance of the contract involves the breach of the law of a foreign and friendly State; and, provided that the law does not offend on some ground as being contrary to public policy, such as laws concerning slavery or the like, I can see no reason in principle why the result should depend upon the nature of the law itself. English public policy being to do nothing which will cause complaint from a foreign sovereign State, it seems to me that it matters not whether the law is or is not a penal, revenue or political law.

It is true, as Denning L.J. has said, that Lord Mansfield in *Holman* v. *Johnson* [24] used very wide words indeed, and that his statement has been referred to with approval by the House of Lords in the recent case of *Government of India* v. *Taylor* [25]; but it is equally clear that the wording of Lord Mansfield in certain respects, at any rate, is, taken literally, too wide. That was recognized in the House of Lords case and indeed was recognized by Lord Tomlin, then Tomlin J., in *In re Visser, Queen of Holland* v. *Drukker*,[26] and more recently in the Irish case, *Peter Buchanan Ltd. & Macharg* v. *McVey*.[27] There Kingsmill Moore J., having made an exhaustive analysis of the cases and referred to *Foster* v. *Driscoll*,[28] said this: "I doubt "whether Lord Mansfield intended his remarks to preclude a "court from informing itself as to the provisions of a foreign "revenue law in order to determine the question whether a foreign

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[24] 1 Cowp. 341, 343.
[25] [1955] A.C. 491.
[26] [1928] Ch. 877; 44 T.L.R. 692.
[27] [1955] A.C. 516n., 523.
[28] [1929] 1 K.B. 470.

"transaction was or was not fraudulent and void according to the "law of that country."

For my part, I do not see why in principle this court should not also inform itself of the provisions of a penal or revenue law in order to see whether or not the parties to an English contract had in effect agreed to break that law.

For these reasons I would dismiss the appeal.

[After an argument on costs, in which it was pointed out that Scrutton and Lawrence L.JJ. in *Foster* v. *Driscoll*[29] had expressed the view that in such a case no costs should be awarded.]

DENNING L.J. Whatever the position might have been in the court below if this point had been taken, in this court, as the appellant has unsuccessfully attempted to alter the judgment of the court below, we think that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Buckeridge & Braune; Stuart Hunt & Co.*

F. R. D.

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[29] [1929] 1 K.B. 470.

HIGGINS *v.* SILVERSTON.

[Plaint No. M. 426.]

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June 15, 18;
July 4.
Denning, Birkett and Parker L.JJ.

Landlord and Tenant—Rent restriction—Premises within the Acts—Conversion after 1954*—Flat made self-contained—"Other premises"—Meaning—Housing Repairs and Rents Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 53), *s.* 35 (1).

The Housing Repairs and Rents Act, 1954, provides by section 35 (1): "The Act of 1920 shall not apply to a dwelling-house which "consists, and consists only, of premises falling within either of the "following paragraphs, that is to say,—(*a*) separate and self-"contained premises produced by conversion, after the commence-"ment of this Act, of other premises, with or without the addition "of premises erected after the commencement of this Act . . . ," the date of which was August 30, 1954.

Before 1955 the owner of a dwelling-house of three floors let the first and second floors to tenants, himself occupying the ground floor and using the bathroom and lavatory on the first floor in common with the tenant. In 1955 he sold the house to the present landlord, who did extensive work on the ground floor, which previously consisted of a living room, bedroom, kitchen, scullery, outside w.c. and passage, there being only one inter-connecting door between the rooms. The work done included the division of the bedroom into two parts so as make a new bathroom and lavatory, the construction of inter-connecting doors between the rooms, the insertion of new floors and fireplaces, and the creation of an entrance lobby by putting a door across the passage, so that the premises were (as was held) "separate and self-contained."

The landlord then let the ground floor flat to a tenant, charging a premium of £150 on the footing that it was no longer within the Rent Acts. On a claim by the tenant for the return of the premium:—

Held, that the premises fell within the Rent Acts, as they had not been "produced by the conversion of other premises."

Langford Property Co. Ltd. v. *Batten* [1951] A.C. 223; 66 T.L.R. (Pt. 2) 958; [1950] 2 All E.R. 1079, and *Capital and Provincial Property Trust Ltd.* v. *Rice* [1952] A.C. 142; [1951] 2 T.L.R. 557; [1951] 2 All E.R. 600 applied.

Per curiam. When the work of conversion is so substantial as to change the identity of the premises, you can properly say that there is the conversion of "other premises"; but when it is not so radical as to change the identity, it is not the conversion of "other "premises" but only improvement of the same premises. The expression "other premises" does not mean "premises which were "not previously separate and self-contained."

APPEAL from Judge Baxter, sitting at Brentford County Court.

The following statement of facts is taken from the judgment of Denning L.J.: A house, No. 47, High Road, Chiswick, had three floors. Before 1955 the then owner lived on the ground floor and let off the first and second floors to two tenants. There was an outside lavatory on the ground floor and a bathroom and lavatory on the first floor. The owner used the bathroom and lavatory on the first floor in common with the tenant on the first floor. In 1955 the then owner sold the house to a new owner, who did extensive work to the ground floor. It previously consisted of a living room, bedroom, kitchen, scullery and outside w.c., and the occupiers had to go out into the passage to get from one room to the other (except from kitchen to scullery). The new owner divided the bedroom into two parts by putting in a partition and made one part into a new bathroom and lavatory. He made an entrance lobby by putting a door across the passage; and he made inside doors so that the occupiers could get from one room to the other without going out into the passage. He also put in some new floors and fireplaces, with the result that

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the premises on the ground floor were now separate and self-contained.

The new owner, having done that work, thought that the ground floor was thereby taken out of the control of the Rent Acts altogether, and on that footing he let it to a tenant, Mrs. Higgins, and charged her a premium of £150. She had since been advised that the work was not such as to take the case out of the Rent Acts, and claimed back the £150 she had paid, by virtue of section 2 of the Landlord and Tenant (Rent Control) Act, 1949, which made it illegal to take a premium on a controlled house.

The county court judge gave judgment for the tenant. The landlord appealed.

R. E. Megarry Q.C. and *F. M. Drake* for the landlord. First, the county court judge was wrong in holding that the ground floor flat was "separate and self-contained" before the conversion took place. Nobody in any ordinary use of language would in 1954 use this term for premises where, apart from one connecting door between two rooms, it was impossible to get to one room from another without going out into a common passageway, where the bathroom and only interior lavatory was on another floor and shared with other occupiers, and where there was no outer door. As used in relation to a flat today, the phrase "separate and "self-contained" connotes an outer door or doors which can be locked, enclosing accommodation containing all the reasonable requirements for living having regard to the locality and the class of persons likely to occupy the premises. The judge was wrong in applying the test laid down in decisions on section 12 (9) of the Act of 1920, for that subsection speaks of "separate and "self-contained flats or tenements," and the word "tenements," which is not used in section 35 of the Act of 1954, colours "separate and self-contained": a tenement might well be regarded as "separate and self-contained" where a flat would not. Further, of the cases on section 12 (9) of the Act of 1920, *Darrall* v. *Whitaker*,[1] although purporting to approve *Smith* v. *Prime*,[2] in fact lays down a test inconsistent with it. In *Smith* v. *Prime* [2] Roche J. held that "separate and self-contained" merely meant that the rooms were not scattered about the house; but in *Darrall* v. *Whitaker* (as reported in 39 T.L.R. at p. 448)

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[1] (1923) 39 T.L.R. 447; 129 L.T. 672.

[2] (1923) 39 T.L.R. 403; 129 L.T. 441.

Lush J. defined a self-contained flat as a complete residence which contained in itself all that was reasonably necessary for persons in the class of life of those who require such a flat as a residence. On this test, the ground floor was formerly not separate and self-contained. *Boyle* v. *Fitzsimons*[3] also applies the test whether within the ambit of the flat there is a complete residence.

Secondly, there has here been a conversion of "other "premises." The phrase "produced by conversion" in section 35 (1) of the Act of 1954 indicates that a lesser degree of work will satisfy the section than would have satisfied section 12 (9) of the Act of 1920, which uses the more far-reaching expression "bona fide reconstructed by way of conversion": a conversion which falls short of reconstruction now suffices. Further, the whole framework of the two subsections is different. Under section 12 (9) of the Act of 1920 one starts with a dwelling-house and ends with the two or more separate and self-contained flats into which it has been converted. Under section 35 (1) of the Act of 1954 one must start with the end-product of the conversion, namely, the present flat, and then look backwards to see whether that flat has been produced by the conversion of "other "premises." A flat as now existing cannot be "other premises" than the flat as it was, in any geographical or physical sense: whatever work of conversion is done, the ground floor is still physically the ground floor. "Other" must thus be used in the sense not of physically different but of qualitatively different, or, in other words, as referring to premises which lack the quality of being separate and self-contained. If premises which are not separate and self-contained are converted into premises which are, the subsection is satisfied. This effectuates the policy of the Act, which, inter alia, is to encourage the production of more living accommodation which, being self-contained, accords with modern standards. As Holmes J. once said: "The courts are apt to err "by sticking too closely to the words of a law when the words "import a policy that goes beyond them."[4]

The geographical test would produce anomalies. If the damaged remains of a house or stables, containing habitable rooms, but lacking kitchen or lavatory, are converted into a self-contained flat or house, as by adapting some of the habitable rooms, the flat or house has not been produced from geographically different premises, yet it would be wrong to deny it the benefits of the subsection; and similarly if an undamaged garage or shop is converted into a dwelling. It would be strange if in such cases the landlord could claim the benefit of the subsection if, by excluding a room or other small portion of the old premises from the new house or flat, he could say that the old premises were geographically "other premises," whereas if he uses all of the old premises for the new, he will be outside the subsection. Again, what of successive conversions of separate floors? Suppose the ground floor of an old house to be converted into a flat before August 30, 1954, the first floor in 1955, and the second floor in 1956. Are these three conversions or one; and if one, when was it made? Each floor is converted by itself, and so is not produced by converting what are geographically "other" premises. And even if the ground and first floors can be said to have been produced by converting what are physically "other" premises (for there are still other unconverted parts of the house left), will it be said that the second floor can never fall within section 35 (1) because when it is converted the other floors have already been converted, and so there are physically no "other" premises left?

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[3] [1926] I.R. 378, 383.

[4] *Olmstead* v. *U.S.* (1928) 277 U.S. 438, 469.

It is accepted that if "other premises" means "premises "which are not separate and self-contained," landlords may sometimes bring themselves within the subsection with comparatively little expenditure, e.g., where all that is needed is the provision of an outer door to shut off a top floor containing all the necessary amenities from the rest of the house. But this will be the exceptional case, and the construction of the subsection ought not to be affected by any assumptions that Parliament did not intend any landlord ever to be able to satisfy the subsection cheaply.

Finally, although it is impossible in this court to challenge the judge's finding that there was no change of identity, it is submitted that even on a physical basis premises may be "other" premises without any change of identity, provided that the changes are sufficient; and in this case they are. There is nothing to warrant the assumption that "other" imports the conception of "change of identity."

Dimitry Tolstoy for the tenant. The policy of the Acts is to encourage landlords to increase the number of dwelling-houses. [*Stockham* v. *Easton*[5] and *Shannon* v. *McMahon*[6] were referred to.] The tenant is entitled to succeed if (1) separate and self-contained premises existed before the alterations, or (2) the new premises were not produced by conversion from "other premises."

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[5] [1924] 1 K.B. 52; 39 T.L.R. 472.

[6] [1945] I.R. 327.

On the first point, the ground floor was already separate and self-contained before the alterations, if one applies the tests set out in *Smith* v. *Prime*,[7] *Darrall* v. *Whitaker*[8] and *How* v. *Martin*,[9] referred to in the latter case. For premises to be separate and self-contained a kitchen is essential, but a bathroom and w.c. are not; they may be shared, and in certain circumstances a bathroom or a share of one is not essential. What has been done here is an improvement or structural alteration which permits the landlord to increase the standard rent by eight per cent. under section 2 (1) of the Act of 1920.

Secondly, the insertion of the words "other premises" indicate that Parliament wanted something more than the mere alteration of some existing premises; something geographically different must be produced, bearing in mind the intention of Parliament to produce more dwelling units. A "conversion" is much the same as a reconstruction; something of a substantial nature must be done; it requires that something should be turned into something different. What was done in the present case was not sufficient to amount to a conversion.

Megarry Q.C. in reply. "Conversion" of premises involves little or no work; in *Wilkinson* v. *Rogers*[10] a covenant against converting premises into a shop was broken by doing something which did not involve any structural work. All that is required is that premises should be made separate and self-contained which were not so before. This is the first time that the subsection has had to be construed by the courts. It should be given the simple and workable construction that "other premises" means premises which were not separate and self-contained before; a landlord may be liable to criminal proceedings if he makes a mistake.

Cur. adv. vult.

July 4. Denning L.J., reading the judgment of the court, after stating the facts, continued: The question depends on whether the ground floor has been taken out of the Acts, and this in turn depends on the true construction of section 35 (1) of the Housing Repairs and Rents Act, 1954, which now comes before this court for the first time. It says that "The Act of

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[7] 39 T.L.R. 403.

[8] 39 T.L.R. 447.

[9] The Times, Feb. 28, 1923.

[10] (1864) 2 De G.J. & S. 62.

"1920 shall not apply to a dwelling-house which consists, and "consists only, of premises falling within either of the following "paragraphs, that is to say,—(*a*) separate and self-contained "premises produced by conversion, after the commencement of "this Act [August 30, 1954], of other premises, with or without "the addition of premises erected after the commencement of "this Act; (*b*) premises erected after the commencement of this "Act."

We take the object of the section to be to encourage the building of new houses or the conversion of old ones by taking them out of the Acts altogether. No difficulty arises about new houses. The difficulty is the conversion of old ones. Here Parliament have been very careful not to allow a landlord to escape too easily from the Acts. It must be remembered that when the landlord incurs expenditure on the improvement or structural alteration of a dwelling-house, he can increase the rent by eight per cent. of the amount expended (see section 2 (1) of the 1920 Act), but the house still remains within the Acts. In order to take the house out of the Acts, there must, therefore, be something more than the improvement or structural alteration of a dwelling-house. The question is, what is that something more?

Under section 35 (1) (*a*) the first thing to ask is whether the premises as they now exist are "separate and self-contained "premises." The answer is that this ground floor is now certainly separate and self-contained.

The second question is whether the premises as they now exist have been "produced by conversion of other premises."

Mr. Megarry urges us to hold that the words "other "premises" mean "premises which were not previously separate "and self-contained." It is, he says, the quality of being "separate and self-contained" which must be produced by conversion. He recognizes that this interpretation may enable a landlord in some cases to escape the Acts by a trifling amount of work. For instance, in order to make a floor separate and self-contained, he might only need to put in an outer door, or a sink, or a bathroom, and it would take the premises out of the Acts.

We do not agree with Mr. Megarry's interpretation. It fails to distinguish adequately between the improvement of *the same* premises (which entitles the landlord to an eight per cent. increase in rent) and the conversion of *other* premises (which takes them out of the Act altogether). By using the word "other" Parliament makes it clear that it is not sufficient to convert the *same* premises. It is, therefore, not sufficient for the landlord to make the *same* premises self-contained where they were not self-contained before. There must be the conversion of *other* premises.

What, then, do the words "other premises" mean? It is, we think, best shown by taking some cases which clearly fall within the section. The first is the case of a coach-house in a mews which, by much work, is turned into a dwelling-house with all the necessaries of life. The dwelling-house is then "separate "and self-contained premises produced by conversion of other "premises." The coach-house was "other premises." It was a different thing altogether. There was complete change of identity. The new house was produced by conversion of "other "premises," namely, a coach-house. The second is the case of a dwelling-house which was previously capable of being used only for one family, and then substantial structural alterations are made so as to turn it into two separate and self-contained flats with all the necessaries of life in each. There is again a complete change of identity. The original house was "other "premises." The two new flats were produced by conversion of those other premises.

There is a whole body of law under the Rent Acts on this point of "change of identity." It is effectual to prevent a landlord from escaping the Acts by making a small physical change. There must be structural changes which alter substantially the character of the premises. Mere improvement or structural alteration by itself does not effect a change of identity. Something more radical must take place: see *Langford Property Co. Ltd.* v. *Batten*, *per* Lord Radcliffe.[1] Any other view would play havoc with the Acts and defeat their object: see *Capital & Provincial Property Trust Ltd.* v. *Rice*,[2] *per* Lord Porter and *per* Lord Reid. We cannot help thinking that Parliament had that body of law in mind when they used the words "other premises." When the work of conversion is so substantial as to change the identity of the premises, you can properly say that there is the conversion of "other premises": but when it is not so radical as to change the identity, it is not the conversion of "other "premises" but only improvement of the same premises.

We are confirmed in this view by the concluding words in section 35 (1) (*a*), "with or without the addition of premises

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[1] [1951] A.C. 223, 240; 66 T.L.R. (Pt. 2) 958; [1950] 2 All E.R. 1079.

[2] [1952] A.C. 142, 150, 151, 163; [1951] 2 T.L.R. 557; [1951] 2 All E.R. 600.

"erected after" August 30, 1954. Those words hark back to *Langford Property Co. Ltd.* v. *Batten*,[3] where it was held that the addition of a garage might change the identity of a house. The concluding words of section 35 (1) (*a*) make it clear that the landlord is not bound to erect a new garage or a new room. He can convert the old premises as they stand without any new building. But, nevertheless, the conversion must be such that it can properly be described as the conversion of "other premises," not of the same premises. That is, there must be a change of identity.

The county court judge decided in this case that there was not sufficient change of identity. The flat looks different he said, but fundamentally it is the same as before. He directed himself quite properly and his findings on it cannot be disturbed. See *Mitchell* v. *Barnes*.[4] This means, we think, that the flat is not produced by conversion of other premises, but by improvement of the same premises. The landlord qualifies for an eight per cent. increase in rent but the flat is not taken out of the Acts altogether.

There was much discussion before us whether the ground floor *before* the alterations was "separate and self-contained," and several authorities were cited: but we do not think that question arises. Since the alterations, the ground floor is certainly "separate and self-contained premises." The only question is whether that result is "produced by conversion of "other premises," that is, whether the ground floor before the alterations was "other premises," not whether it was "separate "and self-contained." The county court judge did find, however, that even before the alteration it was "separate and self-"contained," and if this was a correct finding, it would mean that even on Mr. Megarry's interpretation of "other premises," the landlord would fail. We express no opinion on this point, because on our interpretation of the section it does not arise.

We would like to say, however, that if Mr. Megarry's interpretation were right, it would involve great difficulties in saying whether the premises were *previously* "separate and self-"contained." Must the premises for this purpose contain a bathroom? If so, a country cottage could be taken outside the Acts by merely putting in a bathroom. Must the premises have an outer door? If so, a top floor set of rooms could be taken outside the Acts merely by putting in an outer door. We are

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[3] [1951] A.C. 223.

[4] [1950] 1 K.B. 448; 65 T.L.R. 734; [1949] 2 All E.R. 719.

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not prepared to subscribe to an interpretation which would enable landlords so easily to avoid the Acts altogether, when their proper remedy is plainly to increase the rent by the permitted amount.

The result is that the ground floor is still within the Acts, the landlord was not entitled to charge a premium, and he must pay it back. The appeal is dismissed.

The judgment which I have read is the judgment of the court.

Appeal dismissed.

Solicitors: *A. Kramer & Co.; John E. Peake, Hounslow.*

F. R. D.

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June 14, 15.

Denning, Birkett and Parker L.JJ.

BUCKINGHAM *v.* DAILY NEWS LTD.

[Plaint No. L. 5649.]

Evidence—View by judge—Value as evidence—Injury to plaintiff while cleaning machine—Action against employers for personal injuries—Demonstration on machine by plaintiff how accident occurred—Evidence for plaintiff that cleaning method dangerous—No evidence for defendants—Finding by judge that accident due to plaintiff's own carelessness—Right of judge to rely on own impressions formed at view—County Court Rules, Ord. 23, *r.* 14.

The plaintiff, a rotary machine attendant in the defendants' printing house, was cleaning the "tucking blades" of a rotary press, while the machine was stationary, by means of a swab held in the hand, when he cut his hand on the sharp edge of one of the blades. He brought an action against his employers claiming damages for a breach of their common law duty to provide a reasonably safe system of work; the defendants alleged contributory negligence.

At the trial in the county court, the judge, on the invitation of the parties, went to the defendants' premises, and in the presence of counsel on both sides inspected the machine and watched a demonstration by the plaintiff of the manner in which he was cleaning the blades when the accident occurred. He then in court heard evidence given by the plaintiff and other witnesses on his behalf to the effect that the system of cleaning the blades by hand with a swab was dangerous, the proper method being to use a long-handled brush. The defendants called no evidence.

In giving judgment, the judge, after reviewing the evidence, expressed the view that the system was reasonably safe and the accident had been caused by the plaintiff's own carelessness, and dismissed the action. On appeal:—

Held, that in a case of such a nature, which required no expert evidence, a judge was entitled to follow his own impressions formed at a view, and to give judgment accordingly.

Per Denning L.J. The observations of Lord Alverstone C.J. in *London General Omnibus Co. Ltd.* v. *Lavell* [1901] 1 Ch. 135; 17 T.L.R. 61 unduly restrict the function of a view. Everyday practice in these courts shows that, where the matter for decision is one of ordinary common sense, the judge of fact is entitled to form his own judgment on the real evidence of a view, just as much as on the oral evidence of witnesses.

Per Parker L.J. The note under Ord. 23, r. 14, of the County Court Rules in the County Court Practice goes much too far; what the judge saw at the view was part of the evidence.

London General Omnibus Co. Ltd. v. *Lavell* (supra), *Cole* v. *United Dairies (London) Ltd.* [1941] 1 K.B. 100; 57 T.L.R. 102; [1940] 4 All E.R. 318 and *Kessowji Issar* v. *Great Indian Peninsula Railway Co.* (1907) 23 T.L.R. 530 distinguished.

Appeal from Judge Block, sitting at the Mayor's and City of London Court.

The facts, summarized in the headnote, are stated in the judgment of Birkett L.J.

C. J. A. Doughty Q.C. and *Michael Scholfield* for the plaintiff. The view of the machine by the county court judge was carried out under Ord. 23, r. 14 (1), of the County Court Rules; there is a note to that rule in the County Court Practice that "inspection under this rule does not do away with the necessity for "evidence," and *London General Omnibus Co. Ltd.* v. *Lavell* [1] was cited as authority. There is a similar note to Ord. 50, r. 4, of the Rules of the Supreme Court in the Annual Practice.

The main ground of appeal is that the judge formed his conclusion that the system of work was not unsafe from his own observations, quite regardless of the evidence for the plaintiff, which was to the effect that it was unsafe; that evidence was not contradicted by the defendants, who called no evidence at all. A judge must not reject unanimous evidence simply because he forms his own impressions at an inspection; in particular, it is most unsafe for him to hold himself out as a judge of what is or is not dangerous in matters connected with machinery. [*London General Omnibus Co. Ltd.* v. *Lavell* [2]; *Kessowji Issar* v. *Great Indian Peninsula Railway Co.* [3]; *Cole* v. *United Dairies (London) Ltd.*,[4] and *Goold* v. *Evans & Co.* [5] were referred to.]

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[1] [1901] 1 Ch. 135; 17 T.L.R. 61.

[2] Ibid.

[3] (1907) 23 T.L.R. 530.

[4] [1941] 1 K.B. 100; 57 T.L.R. 102; [1940] 4 All E.R. 318.

[5] [1951] 2 T.L.R. 1189.

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Hugh Griffiths for the defendants. This was a plain case on the facts, in which no expert evidence would be required to assist the judge whether the system was dangerous or not. A judge is entitled to apply what he has personally seen in deciding whether to accept or reject evidence on the question whether there was or was not danger; there is nothing in the authorities which bars him from using the knowledge acquired at an inspection in deciding whether to accept or reject the evidence of witnesses. It was conceded for the plaintiff that if the defendants had called a witness who said that the process was not dangerous the court could not upset the judge's finding. Lord Macnaghten said in *Payton & Co. Ltd.* v. *Snelling, Lampard & Co. Ltd.*[6] that a judge, "looking at the exhibits before him and also paying due attention "to the evidence adduced, must not surrender his own independent judgment to any witness."

In *Lavell's* case[7] the court was not intending to lay down a general rule that a judge may not act on his own impressions formed at a view; that case involved questions of deceitful intention. [*North Cheshire and Manchester Brewery Co. Ltd.* v. *Manchester Brewery Co. Ltd.*[8] and *Bourne* v. *Swan & Edgar Ltd.*[9] were referred to.] The *Great Indian Peninsula Railway* case[10] is distinguishable in that the judges substituted their own view of what they saw on a different occasion for the evidence of the witnesses as to the state of affairs at the material time; the *United Dairies* case[11] is distinguishable in that there the arbitrator was preferring to rely on his own observation on a matter which required expert evidence.

This machine was too large to bring into court, so the judge had to go and see it; but the procedure was essentially the same as if it had been brought into court and made an exhibit, when it would form quite naturally part of the evidence. This was a simple finding of fact, which the Court of Appeal cannot set aside unless it is perverse. The authorities do not support the wide observations in the County Court Practice.

Doughty Q.C., in reply, referred to *General Cleaning Contractors Ltd.* v. *Christmas.*[12]

Denning L.J. I will ask Birkett L.J. to deliver the first judgment.

[6] [1901] A.C. 308, 311.

[7] [1901] 1 Ch. 135.

[8] [1899] A.C. 83; 15 T.L.R. 110.

[9] [1903] 1 Ch. 211; 19 T.L.R. 59.

[10] 23 T.L.R. 530.

[11] [1941] 1 K.B. 100.

[12] [1953] A.C. 180; [1952] 2 All E.R. 1110.

BIRKETT L.J. This appeal raises an interesting question. The plaintiff, Thomas Alfred Buckingham, was employed by the defendants, the Daily News Ltd., who produce and print the News Chronicle and the Star; they are newspaper proprietors and publishers. Mr. Buckingham had worked for six years with the defendants and he was described by himself as a rotary machine attendant. It is quite clear that for six years he had been dealing with a machine of the type with which we are concerned today. That machine was at the premises of the defendants in Bouverie Street, where the papers are printed.

I need not go into the technical matters very deeply, because they do not matter very much, but there are certain "tucking "blades" of which we had photographs put before us. They are employed in the process of folding the newspapers, which is done in these modern days at very high speed. These tucking blades get covered with oil and ink, and attract, no doubt because of that condition, dirt, so that from time to time it is necessary that they should be cleaned.

The plaintiff on January 19, 1955, was employed as a rotary press assistant and was actually engaged in the task of cleaning the tucking blades at the defendants' premises at Bouverie Street when he met with this accident which is said to have required 11 stitches to be put in. It was a cut due to the sharpness of the tucking blade. The evidence was that the tucking blades when they are originally put in are not sharp; they are blunt, but by use they very quickly become much sharper, not so sharp, says the judge, as a razor blade, but sharp enough to cut; and that was an element which the judge had in mind.

The method of cleaning the blade was by using what is called a swab; it was produced to us and was of the nature of a household dish cloth. The position of the plaintiff when engaged on this task was slightly above and slightly looking down on the tucking blades, and his hand was holding the dish cloth or swab while he worked at his task, the tucking blades being at rest—not moving—to clean from them the oil, the grease and the dirt and the accumulation with which they were covered.

It was when he was engaged in that task that the corner of one of the plates cut him. Apparently he made a very sharp, almost involuntary, motion, and received the cut. He brought the action, therefore, against the defendants at common law. There is no question of any regulations about fencing or anything of that sort complicating the case. He merely alleged that the employers failed in their common law duty to him to provide a reasonably safe system of work.

I have commented on how frequently that phrase is now used since it appeared in *Wilsons and Clyde Coal Co. Ltd.* v. *English.*[1] But I think that it is always to be understood that the common law duty which is invoked, where it is said that the employers failed in their common law duty, is that the master must take reasonable care for his servants' safety. That is how it is simply expressed, and all that *Wilsons and Clyde Coal Co. Ltd.* v. *English*[2] does is to enlarge upon the detail of that duty. In particular, Lord Wright said that it was a three-fold duty: the provision of a competent staff of men; adequate material; and a proper system of effective supervision. It is not an enlargement of the duty but an illustration of the nature of the common law duty which has always rested upon the employer: he must take reasonable steps for the safety of his workmen.

When this case came before the judge, what was said by the plaintiff was that he got his injury, his cut, because of the defendants' failure to carry out that common law duty to take reasonable steps for his safety, in that they did not provide a proper and reasonably safe system of work. There was no duty laid on the plaintiff to go into particulars as to the safe system of work suggested; it was enough for him to say, if it be the fact, that the system of work which was in operation was not reasonably safe. That was a system of swab cleaning by hand. It was said that that was a defective system, and it was suggested that a long-handled brush should be used to clean the blades, when there would be no possibility of the hand coming into contact with sharpened tucking blades. That was the nature of the complaint.

When the case started, the judge, having been invited, with the consent of counsel on both sides, as I think very wisely and very properly, to go to Bouverie Street to see the machine, decided to go. He went accompanied by counsel on both sides and by the plaintiff, and they saw the machine on which the plaintiff had been working with the very blades. Mr. Doughty says that, with the machines running, there was a great deal of noise going on, and no doubt it was difficult to hear what was said. It was said by Mr. Griffiths—and Mr. Doughty does not really challenge it, though he says that in fact he did not see it—that the plaintiff showed the judge at Bouverie Street on this machine exactly what he was doing with the tucking blades on the day on which the accident took place.

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[1] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628.

[2] Ibid.

The first contention made by Mr. Doughty in this court was that the judge made up his mind on this case on the view, and had made up his mind when he returned to court to listen to the evidence. I think that there is no warrant for that submission or observation, and I think that in fact we had clear evidence that that was not so. But the substantial submission that Mr. Doughty makes is that what the judge did in this case was something forbidden by law, according to the authorities; namely, that he cast to the winds the evidence that was given for the plaintiff in this case and substituted for that evidence the impression which he had gained when he made the view at Bouverie Street. And Mr. Doughty said time and again, in order to emphasize the strength of his submission, that the evidence was all one way; meaning thereby that no evidence was called for the defendants, as indeed there was none. The only evidence called was on behalf of the plaintiff; and Mr. Doughty is perfectly entitled to say that in that sense the evidence was all one way: it was the evidence for the plaintiff. It is true that the witnesses were cross-examined by Mr. Griffiths for the defendants; but then Mr. Griffiths took the course of electing to call no evidence for the defendants; and then the judge proceeded to give judgment.

And so the first submission—and it is an important submission—made by Mr. Doughty is that in this case what the judge did was (to use a phrase that is employed in one of the cases cited to us) to cast to the winds the evidence which had been given for the plaintiff and to substitute for that evidence the mere opinion or impression which he himself had gained at the view.

He cited in support of that submission *London General Omnibus Co. Ltd.* v. *Lavell.*[3] That case was decided by Farwell J. in the court of first instance, and the report is that of the decision of the Court of Appeal. The headnote reads: "In "an action for deceit brought on the ground that a particular "article used by the defendant is a colourable imitation of the "plaintiff's, the conclusion of the judge, on a view by him of the "two articles—such as two rival omnibuses—under the Rules of "the Supreme Court, 1883, Ord. 50, r. 4, that the defendant's "article is calculated to deceive, is not sufficient by itself to "support an injunction. The judge must be satisfied by "independent evidence that there is at least a reasonable "probability of deception."

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[3] [1901] 1 Ch. 135; 17 T.L.R. 61.

What had been said by Farwell J. was that the mere sight of the two omnibuses was enough for him. The statement of facts reads[4]: "the learned judge gave judgment finding that there "was, on the side-panels of the defendant's omnibuses, 'the "'most undoubted imitation that would deceive the ordinary "'traveller'; that the defendant had 'intentionally designed' "the resemblance with a view to getting hold of passengers "intending to use the plaintiffs' omnibuses; and that the casual "passenger, though not the expert, would very probably be "deceived into thinking that the defendant's omnibuses were "the plaintiffs'." He decided on that, although there was evidence given, as it would appear, by saying that it was palpable to the view.

When the Court of Appeal dealt with that matter, Lord Alverstone C.J., in reversing the judgment of Farwell J., said[5]: "In my opinion, the judgment of the court below cannot stand. "It seems to me to have proceeded upon the theory (the deceit "being founded upon the suggestion that the defendant had run "an omnibus which is likely to divert passengers from the "plaintiffs' omnibuses) that the plaintiffs are entitled to succeed "on the simple proof of colour and design of their own omnibus, "and on the learned judge viewing the defendant's omnibus and "the plaintiffs', and comparing them together. In my opinion, "that is not sufficient to justify the plaintiffs in obtaining either "an injunction or damages. We have no evidence before us as "to what is the custom, or practice, or habits of persons who "are riders in these omnibuses, nor as to what has grown up to "be regarded as the leading features of omnibuses on any "particular route"; and so on. He later used the words on which Mr. Doughty strongly relies[6]: "but I have never heard "it said, and, speaking for myself, I should be very sorry to "endorse the idea, that the judge is entitled to put a view in "the place of evidence. A view, as I have always understood, "is for the purpose of enabling the tribunal to understand the "questions that are being raised, to follow the evidence, and to "apply the evidence. Of course, it is quite possible there may "be cases in which all the circumstances connected with the "matter in dispute are of such common knowledge, and are so "well known to the tribunal that it may be said no evidence is "necessary; as, for instance"—and then he gives illustrations to support that statement.

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[4] [1901] 1 Ch. 135, 136.

[5] Ibid. 138.

[6] Ibid. 139.

Then he said a little later[7]: "It is said that in *North* "*Cheshire and Manchester Brewery Co. Ltd.* v. *Manchester* "*Brewery Co. Ltd.*[8] the Lord Chancellor observed that he "himself should not have required any evidence in that case, "and he perhaps, in one respect, went further, for in an earlier "part of his judgment he said that the particular question "whether the resemblance in name was likely to deceive could "not have been put to witnesses, because it was the very "question which the judge had to decide. But I am satisfied, "myself, that the Lord Chancellor did not mean to lay down any "general rule that no evidence that a particular thing was "calculated to deceive was ever to be required." The other judges supported that view.

It seems to me to be quite clear from the decision in that case that Lord Alverstone and the Court of Appeal were dealing with a very special set of facts; and, as is said so frequently in this court, to apply a decision given on one particular set of facts as though it applied to every other given combination of facts is straight away to run into error. It is clear that the ground of that decision was that the court was saying that what Farwell J. did was to say, in effect: I really do not need evidence; I myself can see these two omnibuses and their colouring, and I am satisfied that the case is made out. The Court of Appeal was saying: that will not do, because the judge has not the knowledge that the expert witnesses have, namely, knowledge of the character of the people who use these omnibuses, the things they like, the things they dislike, the things that attract them, the things that repel them, and so on; he has no right, therefore, to substitute for evidence given upon all such relevant matters some view of his own which has been founded merely on an ocular demonstration of two omnibuses.

That was the main case upon which Mr. Doughty relied, and he said that the doctrine that is laid down there is that a judge has no right to substitute his own opinion for the evidence; and that, he said, is what in this case this judge had done.

I would like to say this: one comes to a consideration of cases of this kind after some experience of one's own, and I think that I may be pardoned if, for a moment, I speak about that experience. In a case which I tried it was alleged that an accident had been caused by a defective stairway. The parties said: We would like you to see it; you can form your own view by seeing the stairway. I went to see the stairway. I had in mind what was

[7] [1901] 1 Ch. 139.

[8] [1899] A.C. 83; 15 T.L.R. 110.

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said upon the one side and the other, and could make up my own mind whether, in my view, every relevant fact being before me, it was a reasonable thing to say it was a dangerous stairway, or a dangerous floor, a too-highly polished floor, and matters of that kind. As a judge of first instance, I visited factories, workshops, shops, cinemas—all for the purpose of seeing for myself the nature of the place where the accident occurred—the very material upon which the accident was itself founded.

Then, in addition to that, there are the exhibits that are brought into court. I have seen the model of the side of a house, with all the elaborate modern scaffolding, in order to save me and the parties making a journey to where the house was, the parties having agreed that that model was a faithful representation of the scaffolding and the house. I have seen models of aeroplanes in which it was alleged that accidents had occurred, such models being brought into court by the wish of the parties, so that I could see for myself and form my own opinion.

My own view in that respect is supported by what was said by Denning L.J. in *Goold* v. *Evans & Co.*[9] The point in that case was different from that which we have to discuss here, because in that case one of the parties was absent when the view was taken. The headnote says: "A county court judge, in the "course of the hearing of an action for damages for injury to a "workman alleged to have been due to the negligence of his "employers, and in which he gave judgment for the employers, "viewed the premises and saw an operation which purported to "be the same as that which the workman had been engaged in "at the time of the accident. Owing to a mistake, the workman "was not notified of the date of the inspection and was not "present at the view:—

"Held, that a view in the absence of one party, whether it "is to be regarded as evidence in the technical sense or not, "must be in the same position as other evidence; that the view "in the absence of the workman was an inadmissible view, and "one on which, prima facie, the judgment was based; and that "accordingly there must be a new trial before another judge."

Denning L.J. said[10]: "It is a fundamental principle of our "law that a judge must act on the evidence before him and not "on outside information; and, further, the evidence on which "he acts must be given in the presence of both parties, or, at "any rate, each party must be given an opportunity of being "present. Speaking for myself, I think that a view is part of

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[9] [1951] 2 T.L.R. 1189.

[10] Ibid. 1191.

" the evidence, just as much as an exhibit. It is real evidence. " The tribunal sees the real thing instead of having a drawing " or a photograph of it. But, even if a view is not evidence, the " same principles apply."

I would very respectfully adopt that language, and say that when a judge goes to see machinery, and sees it in operation when the parties are present and everything is done regularly and in order, it is just the same as though the machine were brought into court and the demonstration made in the well of the court, so that the judge or judges may see it.

In that connexion I think that it is important to remember the words that were used by Lord Macnaghten in *Payton & Co. Ltd.* v. *Snelling, Lampard & Co. Ltd.*,[11] which is merely reported for the usefulness of the observations made in the case by Lord Macnaghten and Lord Davey, the actual facts of the case not being themselves reported. It was a passing-off action with regard to branded coffee. This is what Lord Macnaghten said: " One word with regard to the evidence I should like to say. I " think, as I have said before, that a great deal of the evidence " is absolutely irrelevant, and I do not myself altogether approve " of the way in which the questions were put to the witnesses. " They were put in the form of leading questions, and the " witnesses were asked whether a person going into a shop as a " customer would be likely to be deceived, and they said they " thought he would. But that is not a matter for the witness; " it is for the judge. The judge, looking at the exhibits before " him and also paying due attention to the evidence adduced, " must not surrender his own independent judgment to any " witness."

That is very high authority, coming from Lord Macnaghten. Looking at the exhibits, whether they are in the court or whether the judge goes to see them (if I may put that gloss upon it), paying due attention to the evidence adduced—in this case the evidence of the witnesses for the plaintiff—he must not surrender his own independent judgment to any witness.

Let me now say just a few words about the witnesses. I have already said that I think that there is no support for the submission that the judge had made up his mind when he came back from the view and before the evidence was called—none whatever; because if the notes of the evidence are looked at, it is seen that they are full—examination-in-chief, cross-examination and re-examination. All the major points made by Mr. Doughty are recorded here. The submissions made by counsel on both sides are perfectly set out; and it is quite clear that when the judge came to deliver his judgment, he was referring back to each one of the witnesses that he had heard in this case.

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[11] [1901] A.C. 308, 311.

The first was the plaintiff himself. I will not go through his evidence; but he gave evidence about what actually happened. He explained to the judge that he had been doing this job for about six years—not an unimportant fact. He told the judge: "I thought it was a hazard, cleaning these tucking blades with "a swab." Then he said that he did not think the method of putting the hands near the blades was a safe one. All that was before the judge.

One witness said: "I think this method of a swab cleaning "these blades is utterly out of date." He suggested a long brush made specially for the job, that he would use a brush soaked in paraffin; and so on. Another witness said that it was after Mr. Buckingham's accident that the suggestion was made by the union that there should be brooms or brushes supplied instead of the method of the swabs. The assistant secretary of the printers' union, NATSOPA, Mr. Walters, said that he was rather surprised still to find this, as he suggested, rather antiquated cleaning method going on at Bouverie Street. All that was faithfully recorded by the judge.

Then they called an expert. He said that the blades became sharp in use. Everybody knew that: there was no need of an expert witness to prove that. He said that he was told about swab method. That is the method of cleaning. "Spaced blades "particularly make it dangerous." There was a little space between them. He said "You can catch on corners. You are "not wiping plain surface. I used brush. I found no difficulty "with a brush. I consider it safe and I found it effective." That is what he said in chief. I should have thought it clearly did not require any expert witness to give that evidence. If I may use the phrase that we always use in the courts, that is plainly a matter of common sense, that if there are spaced blades which have become sharp, there is quite clearly a risk of cutting.

He was cross-examined, and he appeared to suggest that the position where the plaintiff was standing rather aggravated the risk; but he withdrew that. He said: "I am not suggesting "that light has any bearing on accident. Position in which he "was standing has nothing to do with the danger." And then he went on merely dealing with the question of the swab versus the brush.

That was the evidence; and then Mr. Doughty made his submissions; Mr. Griffiths replied; and then the judge gave his judgment, in the course of which he reviewed the evidence which had been called, to which I have referred, showing that he had all the evidence clearly in his mind. He said that he was invited by counsel to go and see this place, and was very glad that he did, because it enabled him to understand fairly easily what happened on that day, which might otherwise have been rather difficult to comprehend. Then he gave a resumé of what the plaintiff had told him, and of the evidence about the swab.

[His Lordship referred to the judge's review of further evidence for the plaintiff, and continued:] There is the judgment of the judge, stating quite clearly and fully the weight of the evidence that was given. Then he goes on to deal with the expert witness, who had inspected the machine, and "thought "it was not a safe method and that a brush was more satis-"factory." Then the judge further dealt with the evidence and with the authorities to which he was referred.

Having reviewed all that he then gave his judgment in this way: "I think this case falls to be decided upon really simpler "issues. As I understand the law, it is the duty of the employers "to provide a reasonably safe system of working, not a foolproof "system or one which involves an enormous expenditure of "money in providing it." So the judge is saying that it is the duty of the employers to provide a reasonably safe method of working. The law is there quite accurately stated.

Then he continues: "Now I have looked at this machine and "in my view when the blades are put in a convenient position "at the discretion of the gentleman who is about to clean them, "he has good light on the subject of his work." If we stop there, that was obviously to be seen by the judge when he was there. He saw the plaintiff stand in the place in which he said he was standing; he saw the light, and he said "he has good "light on the subject of his work"; one of the witnesses, as I have pointed out, having rather suggested at one time that light might have had something to do with it.

Having considered the evidence the judge says "they are "easily accessible." That is the blades. "Any adult man "using reasonable care in cleaning off sharpish blades, but by "no means razor blade sharpness, should find no difficulty what-"ever in doing this work of cleaning the blades of this tucking "machine."

Mr. Doughty said that the judge had no right whatever to say that; that is his own opinion, and it is contrary to the evidence that was given by the plaintiff. It plainly was. The judge was saying implicitly, though he did not say it in terms, "I reject the whole of that evidence." He had reviewed it, pointed out certain features about it, and then said: Now I have seen it, and that is the conclusion to which I come upon seeing it; and adds: "and in my view the only possible explanation of "this accident, unfortunate though it was, is that Mr. Buckingham was careless in what he was doing and in those circumstances that he was the author of his own misfortune. "Accordingly, there must be judgment for the defendants."

Therefore, on the first submission that Mr. Doughty makes, my own opinion is that the judge was perfectly entitled to do what he did in this case. It is not a proper description of what occurred to say that the judge cast to the winds the evidence that was given, and substituted therefor his own opinion. What the judge manifestly was doing in this judgment was to say: I have in mind the evidence given by the plaintiff; I have taken each witness in turn and stated the substance of what they have said; but I also must bear in mind that I was invited to see the particular operation going on and I did see it. I express my view with regard to it. My own view is contrary to the view of the witnesses which has been given before me, and to that extent, impliedly and implicitly, I reject that evidence.

The other case on which Mr. Doughty laid some stress was *Cole* v. *United Dairies (London) Ltd.*,[12] a case in the Court of Appeal dealing with workmen's compensation. In that case a workman was permanently disfigured by an accident, and he brought proceedings under the Workmen's Compensation Act for a declaration of liability. There was evidence that was not contradicted that the disfigurement would prejudice his chance of obtaining work in that employment. The court said that "the arbitrator is bound "to act upon that evidence and is not entitled to set against it his "own observation of the nature of the injury." The plaintiff in that case was a milk roundsman; he had this disfigurement, and the important evidence was that of the manager of the milk-producing firm, who said that such a disfigurement would be a handicap to a man as a milk roundsman. Sir Wilfrid Greene M.R. said that the arbitrator, having seen this disfigurement, had no right to rely on his own opinion, and say that he did not think that it was a handicap; because, said the Master of the Rolls, the manager was giving evidence as an expert knowing the idiosyncrasies of the customers and matters of that kind, which the arbitrator did not know. In that case the Master of the Rolls was putting it on the ground that the arbitrator was substituting his own view for the evidence which had been given. But, in my opinion, that is not so in the case with which we are dealing. In this case the judge is not in that sense substituting his own view for the expert evidence that has been given. He is saying: I have considered the expert evidence and I am not prepared to accept it. I was invited to see this place; I have seen it; it is a common-sense matter; there is no subtlety about it; there are the blades to be seen; there is the method by which it is done; I have seen it with my own eyes, and I am in as good a position as anybody else to determine whether that is or is not a reasonably safe thing to do.

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[12] [1941] 1 K.B. 100; 57 T.L.R. 102; [1940] 4 All E.R. 318.

Therefore, I am of opinion that Mr. Doughty's first point fails.

With regard to the second point there is very little that I need say. Mr. Doughty says that on the facts, and principally on the evidence which was given of previous tucking-blades accidents, the judge was not entitled to say that there was a reasonably safe system of work; he ought to have paid attention to the evidence which was given by the witnesses who said that they did not think that this system was safe; that in view of that evidence he was not entitled to substitute his own view, particularly in view of the nature of the accidents.

I am bound to say that there was a stage in the argument when I was rather impressed by this list of accidents, and I think to Mr. Griffiths I used, with regard to that list, the word "formidable." But when the list is considered, it comes to this: there is a list of accidents (to use a general term) from the year 1950 to 1955. I think I ought to say this: I hope nobody would accuse me of being callous in the slightest degree—far from it; but the accidents do not appear to have been serious. [His Lordship reviewed the evidence, which indicated that from 1950 to 1955, inclusive, there were some 11 instances of minor cuts to fingers and thumbs in addition to the plaintiff's injury, and continued:] So when the list of accidents at Bouverie Street is analysed and examined in that way, I do not think it supports the view that there was evidence that there was in any sense a dangerous system of work.

Finally, Mr. Doughty says that the thing that is decisive is that the defendants called no evidence at all. All the evidence, he repeated, was one way; that was evidence for the plaintiff to the effect that it was dangerous. The defendants cross-examined to establish that it was not, but they called no evidence to show that it was not; all that is really put against it is what the judge saw; and Mr. Doughty says that the judge is not entitled to do that because it is not evidence.

The conclusion to which I come on this second point is that it was a question of fact for the judge to determine on the facts of the case. He directed himself properly as to the main issue that he had to determine: whether it was made out that this was not a reasonably safe system of work; and he said: "I have seen "this place; I have seen this operation; I have listened to all the "evidence; I have listened to accounts from the witnesses; and "the conclusion to which I come is the conclusion which I put "into my judgment, that the explanation of this accident was the "carelessness of the plaintiff himself and not any fault due to "the method of work; and I therefore give judgment for the "defendants."

I think that the judgment of the judge ought to be upheld, and I would dismiss this appeal.

PARKER L.J. I have come to the same conclusion and I will add only a few words on the interesting and, I think, important question as to the function of a view. So far as this case is concerned, the short question was whether the defendants had failed in their common law duty to the plaintiff to take reasonable care so to conduct their operations as not to expose him to unnecessary risk. It was said that the operation on which he was engaged, cleaning these tucking blades on the rotary press by means of a swab, was a dangerous operation, and that reasonable care demanded that he should have been supplied with brushes with long handles so as to avoid his fingers having to come close to the tucking blades.

As my Lord has said, the county court judge accepted the invitation of counsel to go to the defendants' premises in Bouverie Street and view the machine in question; and he not only did that, but he saw a demonstration there by the plaintiff himself of the operation on which he was engaged when he injured his finger. It was at one time said, and indeed it was said by Mr. Doughty in opening this appeal, that really the county court judge had formed the view—a fixed view that the system was safe—as the result of his inspection, and had really paid no regard to any of the evidence that was thereafter called before him. I should like to say emphatically at once that I see no warrant for any such suggestion. I am sure that the judge listened with great care to the evidence, gave it proper consideration; and, indeed, his judgment shows that he went through it in detail.

But it is said—and this is the important question in the case—that even so the judge was not entitled to do what he did, and that he was substituting the impression he had formed at the view for the evidence in the case, and that he was not entitled to do this. It is contended that the only function of an inspection is to enable the judge to follow the evidence, and that it is, as it were, a mere substitute for a plan or a photograph. For myself, I cannot think that it is so limited. A judge may have to decide whether steps or a staircase are dangerous in their construction or dangerous having regard to the lighting. He may have to decide whether the system of work is safe, or whether an operation is dangerous; and it seems to me that he must be entitled to form at least a prima facie view on inspecting the premises or the operation or the system as to whether they are dangerous or safe. No doubt he will listen carefully and consider any evidence which is put before him. Matters may come to light which were not obvious at the inspection; but in a simple case where "A" says that something is dangerous, and "B" says that it is safe, the judge must be entitled to take into consideration what he saw and the impression that he formed at the view. And it seems to me that it makes no difference if "B" calls no evidence and the only evidence before him is that of "A." Again he is entitled to take into consideration the impression he had formed in assessing the weight to be given to the value of "A's" evidence.

Reference, however, was made to the note in the County Court Practice under Ord. 23, r. 14, of the County Court Rules, where this is said: "A view is merely for the purposes of enabling "the tribunal to understand the questions raised and to follow "and apply the evidence, and must not be used to supply or "take the place of evidence."

As authority for that, *London General Omnibus Co. Ltd.* v. *Lavell*[13] is cited. And, without referring to it, a similar note appears in the Annual Practice under Ord. 50, r. 4, of the Rules of the Supreme Court.

It seems to me, however, that that note, read literally, goes much too far. In the examples referred to above the judge is, in a sense, treating what he saw as part of the evidence, and in my view it was part of the evidence; and I entirely agree with

[13] [1901] 1 Ch. 135.

what was said by Denning L.J. in *Goold* v. *Evans & Co.*[14] Indeed, it is just as much a part of the evidence as if the machine had been brought into the well of the court and the plaintiff had there demonstrated what took place.

My Lord has referred to *London General Omnibus Co. Ltd.* v. *Lavell.*[15] Without referring to it, it seems to me that that was decided on very special facts, and I think for myself that there is a great deal to be said for the explanation of that decision given by Farwell J. in the later case of *Bourne* v. *Swan & Edgar Ltd.*[16] *Lavell's* case does seem to have been treated as an action for deceit and on the basis that further evidence was needed which was not called.

Reference is also made to a case in the Privy Council of an appeal from India, *Kessowji Issar* v. *Great Indian Peninsula Railway Co.*[17] That, as it seems to me, was a very different case. What happened there was that the appellate court, when the matter came before them on appeal, chose themselves to have a view; and Lord Robertson said: "The practical result was that "the appeal was allowed and the suit dismissed, the case being "decided, not on the testimony given at the trial as to what took "place on the night of the accident, but by the judges' observa-"tion of what they saw on another night altogether." It seems to me that that is an entirely different case.

There may, of course, be cases in which the matter falls to be decided on technical evidence, and where a view will not be of any assistance, except, no doubt, as a substitute for a plan or a photograph; and it seems to me that *Cole* v. *United Dairies (London) Ltd.*[18] was such a case. Indeed, as I read the judgment of the Master of the Rolls, he was treating it on that basis, because he says, to take one sentence[19]: "The proper "way to obtain information of that kind"—that was as to the idiosyncrasies, tastes and dislikes of customers—"is by evidence "of the persons who are acquainted with the trade." In other words, he was treating that as technical evidence which a mere view of the plaintiff's injuries would not assist.

So far as the present case is concerned, it was a simple one. It in no way depended on technical evidence. Indeed, if the experts were asked: In your view is this a reasonably safe system of working?—the question might well be objected to because that is the question for the judge; and, as Lord Macnaghten said in

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[14] [1951] 2 T.L.R. 1189.

[15] [1901] 1 Ch. 135.

[16] [1903] 1 Ch. 211; 19 T.L.R. 59.

[17] (1907) 23 T.L.R. 530, 531.

[18] [1941] 1 K.B. 100.

[19] Ibid. 103.

Payton & Co. Ltd. v. *Snelling, Lampard & Co. Ltd.*[20]: "The "judge, looking at the exhibits before him and also paying due "attention to the evidence adduced, must not surrender his own "independent judgment to any witness."

Finally, I would like to add that, like my Lord, I was very impressed at one time in this case with what appeared to be a formidable list of previous accidents. On analysis, however, I think—and I think it so appears from the judge's judgment and the notes of evidence—that all that was proved by way of previous accidents were some nine or so in all ranging over the years 1950 to 1955 at Bouverie Street, and accidents which on the face of it were trivial. It is not a case where it could be said that the judge was giving undue weight to the impression he had formed at the view, and no weight or too little weight to the previous accidents. These were small in number, they were trivial, and the degree of injury likely to result is, of course, a very material question in deciding whether employers are or are not taking reasonable care.

I think that the county court judge was entitled to come to the conclusion to which he did come and I would dismiss this appeal.

DENNING L.J. I entirely agree with the judgments which my Lords have delivered. It follows from our decision today that the observations of Lord Alverstone C.J. in the *London General Omnibus* case[21] unduly restrict the function of a view. Everyday practice in these courts shows that, where the matter for decision is one of ordinary common sense, the judge of fact is entitled to form his own judgment on the real evidence of a view, just as much as on the oral evidence of witnesses.

The appeal must be dismissed.

[After an application for leave to appeal to the House of Lords:]

DENNING L.J. We do not give leave to appeal to the House of Lords. We are simply reaffirming the settled practice of the courts for many years.

Appeal dismissed.
Leave to appeal refused.

Solicitors: *Shaen, Roscoe & Co.; Berrymans.*

F. R. D.

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[20] [1901] A.C. 308, 311.

[21] [1901] 1 Ch. 135, 138, 139.

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May 15,
16, 17;
June 14.

Sellers J.

LUIGI MONTA OF GENOA *v.* CECHOFRACHT CO. LTD.

Shipping — Charterparty — War risks clause — "Government" — Compliance with orders or directions given by "the government of the "nation under whose flag the vessel sails . . . or any other govern-"ment"—Cargo discharged on orders of government in Formosa —No recognition by Foreign Office of any government located in Formosa.

A Czechoslovakian company chartered an Italian shipowner's steamship, *Marilu,* to load a cargo at ports in North China and proceed to ports in Europe. The charterparty, governed by English law, incorporated the Chamber of Shipping war risks clauses (1) and (2), clause (2) of which provided that "The ship shall "have liberty to comply with any orders or directions . . . given "by the government of the nation under whose flag the vessel sails ". . . or by any other government . . . and if by reason of and in "compliance with any such orders or directions anything is done "or is not done, the same shall not be deemed a deviation, and "delivery in accordance with such orders or directions shall be a "fulfilment of the contract voyage and the freight shall be payable "accordingly."

On July 31, 1953, the vessel after duly loading the cargo in North China was bound for Singapore, sailing under the Italian flag, when, near Ockou Island and some 80 miles north of Quemoy (both of which islands were then in the hands of the Chinese nationalists) she was intercepted by a warship flying Chinese nationalist colours and escorted by the warship under an armed guard to Keelung, a port in the north of Formosa, where her cargo was discharged on the orders of a general who said that he came from "the govern-"ment of Formosa" which had decided to discharge the cargo.

In accordance with the charterparty 50 per cent. of the freight had been paid shortly after signing bills of lading, and the shipowner claimed to be entitled to the other moiety of freight. The charterers disputed the claim and the matter was referred to an umpire in London. Before the hearing both parties communicated with the Foreign Office and there were before the umpire communications from the Foreign Office to the effect that (i) Her Majesty's Government had at all material times ceased to recognize the former Nationalist Government of China as being either the de jure or de facto Government of the Republic of China; and (ii) Her Majesty's Government did not recognize that any government was located in Formosa in July and August, 1953. The Italian Government at all material times recognized those carrying on the administration of and in fact governing Formosa as the de jure Government of China.

The umpire found that those carrying on the administration of and in fact governing Formosa were a government and the master, in complying with the orders given to him to proceed to and discharge his cargo at Keelung, was complying with the orders of a

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government, and he awarded that the shipowner was entitled to the moiety of freight claimed. On a case stated by the umpire:—

Held, (1) that on the construction of the clause the qualities or character required by the body giving the orders or directions contemplated must include the exercise of full legislative and executive powers over an established territory; but that on the findings of the umpire the Government in Formosa, which exercised such powers, was a government within the meaning of the clause and it mattered not that that government did not embrace, as it claimed, the whole of the Chinese race or the whole territory of China.

(2) That the statement by the Foreign Office that the British Government did not at the material time recognize the Government in Formosa was not conclusive because (a) as a matter of construction there were no grounds for saying that the charterparty, which fell to be construed as an ordinary commercial document, contemplated that the authority giving the orders or directions should be recognized as a government by Her Majesty's Government; and (b) there was no rule of law which restricted the evidence to be considered to that provided by the Foreign Office.

(3) That the shipowner was entitled to recover the sum claimed.

Kawasaki Kisen Kabushiki Kaisha of Kobe v. *Bantham Steamship Co. Ltd.* [1939] 2 K.B. 544; 55 T.L.R. 503; [1939] 1 All E.R. 819 applied.

Duff Development Co. Ltd. v. *Government of Kelantan* [1924] A.C. 797; 40 T.L.R. 566; *White, Child and Beney* v. *Simmons and Eagle, Star and British Dominions Insurance Co.* (1921) 7 Ll.L.Rep. 187; 8 Ll.L.Rep. 170; (1922) 10 Ll.L.Rep. 278; (1922) 11 Ll.L.Rep. 7; 38 T.L.R. 616 (C.A.) considered.

CASE STATED by an umpire (Mr. A. A. Mocatta Q.C.).

By a charterparty (a printed Gencon form of charter), dated July 4, 1953, charterers, Cechofracht Co. Ltd., a Czechoslovakian company, chartered the s.s. *Marilu*, a steamer belonging to Luigi Monta of Genoa, an Italian company, to proceed to one or two safe ports in North China out of a specified range and "there load a full and complete cargo of soyabeans in bulk . . . "and/or iron ore or other lawful general merchandise . . . and" proceed to one or two safe ports out of "Bulgarian or Rumanian "ports in the Black Sea, Antwerp/Hamburg range, Gdynia/ "Gdansk, Stettin . . . and there deliver up the cargo on being "paid freight as per clause 20." Clauses 15 to 40 were added to the charter in type and by clause 15 were deemed to form part of the charterparty and to apply. By clause 20 freight was payable at the rate of 65s. per deadweight ton guaranteed if discharging at one Rumanian or Bulgarian Black Sea port, 75s. per deadweight cargo ton guaranteed if discharging at one port Antwerp/Hamburg range, 82s. 6d. per deadweight cargo ton guaranteed if discharging at Gdynia/Gdansk/Stettin, all rates to be understood f.i.o. and stowed, payable in transferable pounds sterling in London at owners' favour, as follows: 50 per cent. on signing bills of lading and the balance within 48 hours of the vessel's arrival at first discharging port discountless and non-returnable ship and/or cargo lost or not lost. By clause 26 "discharging ports orders to be declared on or before vessel's "passing Aden if discharging Black Sea, on or before vessel's "passing Gibraltar for any other port." Clause 32 provided that any dispute under the charterparty be referred to arbitration in London; and by clause 33 "New Both to Blame, New Jason, "Chamber of Shipping war risk clauses 1 and 2 Club of Oil "Bunker Clause are deemed to be incorporated in this charter." By clause 36 the master was to declare on arrival at loading port to the shippers or charterers' agents the exact deadweight cargo capacity available for cargo and also the exact quantity on board of bunkers, stores and water. The Chamber of Shipping war risks clauses incorporated were as follows: "War risks "clause. (1) No bills of lading to be signed for any blockaded "port and if the port of discharge be declared blockaded after "bills of lading have been signed, or if the port to which the "ship has been ordered to discharge either on signing bills of "lading or thereafter be one to which the ship is or shall be "prohibited from going by the government of the nation under "whose flag the ship sails or by any other government, the "owner shall discharge the cargo at any other port covered by "this charterparty as ordered by the charterers . . . and shall be "entitled to freight as if the ship had discharged at the port or "ports of discharge to which she was originally ordered. (2) The "ship shall have liberty to comply with any orders or directions "as to departure, arrival, routes, ports of call, stoppages, "destination, delivery or otherwise howsoever given by the "government of the nation under whose flag the vessel sails or "any department thereof, or by any other government or any "department thereof, or any person acting or purporting to act "with the authority of such government or of any department "thereof, or by any committee or person having, under the "terms of the war risks insurance on the ship, the right to give "such orders or directions and if by reason of or in compliance "with any such orders or directions anything is done or is not "done, the same shall not be deemed a deviation, and delivery "in accordance with such orders or directions shall be a fulfilment of the contract voyage and the freight shall be payable "accordingly."

The following were among the facts stated by the umpire. Pursuant to the charterparty the vessel, which was of Italian registry and at all material times (except as hereinafter appears) flew the Italian flag, proceeded to Tsing Tao and there loaded a cargo of iron ore, silk goods and ground nut cakes, loading being completed and the last bill of lading signed on July 26, 1953. The declaration made by the master in accordance with clause 36 was that his deadweight cargo capacity available for cargo was 8,500 tons; on that basis and taking the lowest rate of freight provided for by clause 20, namely, 65s. for discharging at one Rumanian or Bulgarian Black Sea port, the charterers shortly after the signing of bills of lading paid the shipowner £9,325 16s. 9d., being 50 per cent. freight on 8,500 tons at 65s., less certain port charges, brokerage and advances to the master.

The vessel left Tsing Tao on July 27, 1953, bound for Singapore on the first stage of her voyage to Europe, her course being close to the Chinese coast within range of the coastal lights. The voyage proceeded without incident until the early morning of July 31 when a warship, described by the master as a gunboat, flying the Chinese nationalist colours came in sight and signalled to the vessel to stop. The vessel was then near Ockou Island and some 80 miles north of Quemoy. Both those islands off the Chinese coast were then in the hands of the Chinese nationalists whereas continental China was then and at all material times under the control of the communist Central People's Government. The vessel was approached by a motor-boat, sent out from the warship containing several officers wearing naval uniform accompanied by about 15 armed marines; guards were placed in the engine room, on deck, on the bridge and in the radio cabin and a naval officer who spoke English asked to see and inspected the ship's papers, and one of the hatches was on his orders opened and the cargo inspected and sampled. Shortly afterwards two armed junks came alongside carrying armed soldiers and these took over possession of the ship, whereupon the naval officers and marines returned to the warship. The soldiers posted guards at various places on the ship and required the Italian flag to be lowered. One of the soldiers went on the bridge and acted as master or pilot and, without consulting the master, navigated the vessel to Quemoy, where anchor was dropped that night.

The vessel remained at Quemoy until August 4. Her ship's papers were removed by a commission of officers and soldiers who boarded her on her arrival there and, until she left Quemoy, there was an armed guard of about 40 soldiers permanently on board. During this period the master was informed by the soldiers that they were soldiers of nationalist China and was told by one of their officers that the cargo would probably be sequestrated, but that final orders would arrive "from the "superior command of the Formosa Government." On August 4 the master was asked to go aboard the warship that had intercepted the vessel; he did so and was informed by one Commander Chao-To-chi that he had received orders from his superior command to escort the vessel to Keelung, a port in the north of Formosa. The master agreed a course to be followed and returned to the vessel which, with a guard of two naval officers and nine sailors from the warship and under close escort of the warship, left Quemoy in the afternoon of August 4 and set a course for Keelung. During the next morning a British destroyer passed the vessel from the opposite direction and steered close to her stern, presumably to read her port of registry; at that time and throughout her voyage to Keelung she was not flying any flag. On August 5 the vessel arrived off the entrance to Keelung and entered and moored in the inner port under the guidance of a pilot and with the assistance of a tug. Until his arrival at Keelung the master had been repeatedly forbidden to have any communication with the shipowner or any Italian authorities, but after his arrival he was allowed to prepare and send a cable to his owner stating that all was well.

On August 6 the master addressed a written communication to the "Military Commander in Chief, Keelung Harbour" protesting against the taking of his ship by military forces when so far as he knew no blockade was in force against Chinese ports. Various visits to his vessel, which throughout her stay in Keelung was kept under armed guard, followed. One was made by a United States naval officer from the U.S.A. embassy in Formosa. A second was by an interpreter, who brought on board a Chinese nationalist flag to fly on the foremast, but who also said that he had been told by his government that the vessel could again hoist the Italian flag. On August 9 a senior officer informed the master that according to the decision of his government the vessel would be discharged at Keelung. On August 10 a general named Deng came on board accompanied by many other officers. He said that he came from the Government of Formosa and that his government had decided to discharge the vessel. The only reply the master could get from the various officers who came on board as to why they were taking his cargo was "because it belonged to "communist China." Discharge of the vessel started on the same day and continued with some intermission due to bad weather until August 18, when all the cargo had been discharged. The vessel provided steam for the winches during discharge, but all the labour was supplied by the local authorities. As soon as the order to discharge was given to the master he made a written protest, addressed as his previous protest, against such order. During discharge he received a cable from the Italian consulate at Hong Kong asking for a full report regarding the interception and he was able during discharge to send brief cables to his owner and the Italian consul.

After completion of discharge the local naval authorities carried out at their expense repairs to damage to the vessel's side that had been caused by the warship ranging against her, and on August 22 the master was given by an officer U.S. $113 in respect of two watches, which had been stolen by the guards from members of the crew, and was told that his vessel was free. On the following day the master received telegraphic orders from his owner to return to Hong Kong to bunker and then to proceed in ballast to Nauru to load a cargo for Australia. On August 24 a general, who said that he came from the Formosan Government, came on board and told the master that he could not be supplied with the bunkers he had asked for owing to the shortage of supplies in Formosa, but that the compensation which the master claimed for bunkers and stores consumed during the detention of the ship could be applied for by the shipowner by way of diplomatic arrangements between the Chinese and Italian Governments. The vessel was, however, supplied with 70 tons of fresh water. On August 25 the ship's papers, other than the documents relating to the cargo, were returned to the master and he was given his clearance, and shortly after midday the vessel left for Hong Kong whence she subsequently proceeded to Nauru and Australia as ordered by the shipowner. At no time after the interception of his vessel on July 31 until her departure from Keelung on August 25 had the master any real freedom of choice as to the movements or course of his vessel or the discharge of her cargo.

After the departure of the vessel the shipowner claimed that in the events that had happened he was entitled under the terms of war risk clause (2) to the second moiety of freight under the charter, which he claimed to be £13,812 10s., less brokerage of £656 1s. 10d., making a net claim of £13,156 8s. 2d. The charterers disputed the claim and contended that they were entitled to recover excess freight paid by them and the matter

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was referred to arbitration. Before the hearing of the arbitration the solicitors for the parties corresponded with the Foreign Office and received various answers from that department to the questions they had asked. In so far as the answers given by the Foreign Office purported to state facts the umpire found in accordance with such statements, summarizing the most relevant facts established by the Foreign Office answers as follows: (i) Her Majesty's Government had at all material times ceased to recognize the former Nationalist Government of China as being either the de jure or de facto government of the Republic of China; (ii) Her Majesty's Government did not recognize that any government was located in Formosa in July and August, 1953.

On behalf of the shipowner it was contended: (i) that the master, in complying with the orders given to him to proceed to and discharge his cargo at Keelung, was complying with an order of a government as to port of destination, delivery or otherwise within the meaning of war risks clause (2) on its true construction; delivery at Keelung was in consequence a fulfilment of the contract voyage, and, therefore, the balance of freight was due from the charterers under clause 20 of the charterparty; (ii) that the orders given to the master were orders given by or on behalf of those who were in fact the governors of and were governing Formosa and that such persons came within the meaning of the words "or any other government" in war risks clause (2); (iii) that the answer given by the Foreign Office that Her Majesty's Government did not recognize any government as being located in Formosa in July and August, 1953, was either irrelevant to or in no way conclusive of the shipowner's claim and that the umpire was in no way bound by the decision in *White, Child and Beney* v. *Simmons*,[1] on which the charterers strongly relied, to hold the contrary; (iv) that, on their true construction, the words "any other government" in the war risks clause (2) were not limited to the government of a nation, but included the government of any area or territory and certainly of Formosa; (v) that if the words in the clause were limited to the government of a nation, then the government of Formosa was the government of a nation within the true meaning of such words; (vi) that the clause should be construed as part of a commercial document and as referring to commercial realities and should not be construed by reference only to the rights of sovereign States and the technicalities of the recognition by Her

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[1] (1921) 7 Ll.L.Rep. 187; 8 Ll.L. Rep. 170; (1922) 10 Ll.L.Rep. 278; 11 Ll.L.Rep. 7; 38 T.L.R. 616; 127 L.T. 571.

Majesty's Government de facto or de jure of States or governments; (vii) that even if the answer of the Foreign Office as to which government was recognized as the government of Formosa would have been binding and conclusive in the dispute had it been positive, the fact that the answer was negative rendered it irrelevant to or inconclusive of the claim; (viii) that if recognition was a material or crucial consideration, then as the vessel was Italian and flying the Italian flag, the only relevant recognition to be considered and to which her master could be expected to have regard was that of the Italian Government and that that government recognized the government located in Formosa in July and August, 1953, as the Government of the Republic of China (it was not argued that Italian law was the proper law of the charterparty); (ix) that consideration of whether the government in or of Formosa had declared and maintained an effective blockade of China or were in relation to the vessel acting within their rights as belligerents according to international law were irrelevant; (x) that the case of *G. H. Renton & Co. Ltd.* v. *Palmyra Trading Corporation of Panama*[2] had no relevance in relation to the charterparty in the present case owing to the differences between a charterparty and a bill of lading and to the typed references to the war risks clause; (xi) that even if the claim failed and the shipowner had received too much freight, the excess was irrecoverable by way of counterclaim since, apart from the express provision of clause 20, freight paid in advance was not in law returnable.

On behalf of the charterers it was contended (i) that the words "any other government" in the war risks clause (2) meant, on their true construction, "any other government of a "nation," and that this imported the conception of statehood and excluded a de facto body which was merely governing or administering a territory; (ii) that in an arbitration in England or held under a contract governed by English law, as also in an English action, the statement of the Foreign Office as to recognition by Her Majesty's Government was conclusive as to what was the government of or in a particular territory or country and that unless that principle were observed there was likely to be an embarrassing conflict between the judicial and executive views; (iii) that the decision in *White, Child and Beney* v. *Simmons*, both in the reasoning of Roche J.[3] and the reasoning and decision of the Court of Appeal,[4] made the Foreign Office answer that Her Majesty's Government did not recognize any government as located in Formosa in July and August, 1953, conclusive of the shipowner's claim, and that it was insufficient for the shipowner if there was a body governing Formosa unless that body were recognized by Her Majesty's Government; (iv) that recognition or lack of recognition by the Italian Government was irrelevant since the lex fori, or failing that the proper law of the charterparty, and not the law of the flag was relevant on the issue as to recognition; (v) that in any event the body governing Formosa in July and August, 1953, was not the government of a nation; (vi) alternatively, that the war risks clause in both its parts must be restricted to orders or directions given (a) to preserve ship or cargo from risks of war or apprehension of the same, or (b) by or on behalf of a government in the exercise of its belligerent rights; (vii) that the government in Formosa at the relevant time had not established an effective blockade nor had it established a contraband control system; (viii) that the principle of repugnancy acted upon in *G. H. Renton & Co. Ltd.* v. *Palmyra Trading Corporation of Panama*[5] applied and rendered war risks clause (2) unenforceable; (ix) that, accordingly, the war risks clause (2) did not apply and the charterparty was frustrated by not later than August 9, 1953; (x) that if the war risks clause (2) applied to the facts the result was that "freight shall be payable "accordingly" which on the true construction of the clause meant that the shipowner was only entitled to a reasonable remuneration for carriage from Tsing Tao to Keelung and that such remuneration was less than what the shipowner had already received; (xi) that a reasonable remuneration for carriage from Tsing Tao to Keelung less brokerage, port charges and advances to the master was £4,265 13s. 6d. (calculated at the rate of freight of 20s. per ton), and that, since the shipowner had already received £9,325 16s. 9d., the charterers were entitled under war risks clause (2), if it applied, to recover the difference of £5,060 3s. 3d.

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[2] [1955] 3 W.L.R. 535; [1955] 3 All E.R. 251. [Reporter's note.—Owing to the subsequent decision of the Court of Appeal [1956] 1 Q.B. 462; [1956] 1 All E.R. 209, this point, though kept open, was not argued on behalf of the charterers.]

The umpire found the following further facts. At the date of the charterparty hostilities were taking place both in Korea and, in a somewhat spasmodic fashion, between the (communist) Government of the Republic of China and those carrying on the administration of and in fact governing Formosa. The crew of the vessel were at all material times, under the terms of an agreement between Italian shipowners and the Italian Federation of Seafaring Workers, entitled to a 100 per cent. increase in wages whilst in Chinese waters and a 200 per cent. increase in wages whilst in Korean waters; those increases were due to the extra risks involved by reason of hostilities. A rate of freight of 20s. a ton was at all material times a reasonable rate for a voyage from Tsing Tao to Keelung and the figure of £4,265 13s. 6d. was a reasonable remuneration to the shipowner for the voyage which in fact took place.

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[3] 7 Ll.L.Rep. 187; 8 Ll.L.Rep. 170; 10 Ll.L.Rep. 278.

[4] 11 Ll.L.Rep. 7; 38 T.L.R. 616.

[5] [1955] 3 W.L.R. 535. [See reporter's note, ante.]

There was not at any material time an effective blockade of any part of the Chinese mainland nor had those carrying on the administration of and in fact governing Formosa established a contraband control system. Interference with shipping passing along the Chinese coast by those on Formosa was at the material times spasmodic and followed no readily recognizable pattern or principle. Formosa had an area of 13,890 square miles and a population of some eight and a half million. It had a fairly advanced system of primary, secondary and university education, over 4,000 kilometres of railway, extensive agricultural and mining production and industries comprising (inter alia) flour-milling, sugar, tobacco, iron and steel, glass, bricks and soap. Its overseas trade amounted in 1952 to the value of U.S. $115 millions. It possessed at the material time a mercantile marine of over 100 vessels totalling over 300,000 tons gross. The island was divided for local government and administration into five municipalities, each of which had a population in excess of 10,000, and sixteen counties. At all material times the Italian Government recognized those carrying on the administration of and in fact governing Formosa as the de jure Government of China. At all material times the United States Government maintained an embassy in Formosa, but no other facts relating to that embassy or to the recognition accorded by the United States Government were proved. Those carrying on the administration of and in fact governing Formosa called themselves Chinese nationalists, and by their naval and military forces held and controlled at the material time the islands of Ockou and Quemoy off the Chinese mainland.

So far as they were questions of fact the umpire found, and so far as they were questions of law he held, subject to the decision of the court that:—(a) Those carrying on the administration of and in fact governing Formosa were a government, and the master, in complying with the orders given him to proceed to and discharge his cargo at Keelung, was complying with the orders of a government. (b) Neither Formosa nor the Formosans could truly be described as a nation, and for that reason those carrying on the administration of and in fact governing Formosa were not the government of a nation, though they claimed to be the government of a nation, namely, China. (c) The main object and intent of the charterparty was the carriage of the cargo for reward to a port or to ports of discharge in Europe and that was defeated or frustrated by the discharge of the vessel's cargo at Keelung.

The questions of law for the decision of the court were whether on the facts found and the true construction of the charterparty (a) the shipowner was entitled to recover the sum claimed or any sum on his claim, (b) the charterers were entitled to recover the sum claimed or any sum on their counterclaim.

Subject to the decision of the court on the questions of law the umpire held and awarded that the shipowner was entitled to recover £13,156 8s. 2d. on his claim and that the counterclaim by the charterers failed.

The arguments of counsel were substantially the same as the contentions summarized by the umpire in the case stated.

The following cases, in addition to those referred to in the case, were cited in argument: *Burton & Co.* v. *English & Co.*[6]; *The Annette; The Dora*[7]; *Duff Development Co. Ltd.* v. *Government of Kelantan*[8]; *Kawasaki Kisen Kabushiki Kaisha of Kobe* v. *Bantham Steamship Co. Ltd.*[9]; *Banco de Bilbao* v. *Sancha*[10]; *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.*[11]; *Auckland Corporation* v. *Alliance Assurance Co. Ltd.*[12]; *Boguslawski* v. *Gdynia-Ameryka Linie*[13]; *Bank of Ethiopia* v. *National Bank of Egypt and Liguori.*[14]

T. G. Roche Q.C. and *Peter Bristowe* for the shipowners.
Ashton Roskill Q.C. and *Basil Eckersley* for the cargo owners.

Cur. adv. vult.

[6] (1883) 12 Q.B.D. 218.

[7] [1919] P. 105; 35 T.L.R. 288.

[8] [1924] A.C. 797; 40 T.L.R. 566.

[9] [1939] 2 K.B. 544; 55 T.L.R. 503; [1939] 1 All E.R. 819.

[10] [1938] 2 K.B. 176; 54 T.L.R. 603; [1938] 2 All E.R. 253.

[11] [1921] 3 K.B. 532; 37 T.L.R. 777.

[12] [1937] A.C. 587; 53 T.L.R. 347; [1932] 1 All E.R. 645.

[13] [1951] 1 K.B. 162; 66 T.L.R. (Pt. 2) 596.

[14] [1937] Ch. 513; 53 T.L.R. 751; [1937] 3 All E.R. 8.

June 14. SELLERS J. In the circumstances which occurred in the course of the performance of the charterparty and which are clearly found in the award, the shipowner claimed the balance of the freight which he alleged to be due under part 2 of the war risk clause. The award of the umpire would allow the claim in full, but, as the parties desired a case to be stated, the finding is subject to the decision of the court.

By part 2 of the war risk clause, the ship had liberty to comply with any orders or directions as to destination, delivery or otherwise, howsoever given by the government of the nation under whose flag the vessel sailed or by any other government, and if, by reason of or in compliance with any such orders or directions anything was done or was not done, the same was not to be deemed a deviation, and delivery in accordance with such orders or directions was to be a fulfilment of the contract voyage and the freight was to be payable accordingly. Before her arrest in the course of her contractual voyage the *Marilu* was flying the Italian flag. No orders of the Italian Government arose or were relied on by the shipowner, but the award finds that those carrying on the administration of and in fact governing Formosa were a government, and the master, in complying with the orders given him to proceed to and discharge his cargo at Keelung, was complying with the orders of a government.

Those findings of fact are conclusive unless they are shown to be based on some error of law or are inconsistent with other findings in the case.

The arguments of the parties before me are, I think, covered in substance by the submissions to the umpire which are set out in the award, and I do not, therefore, summarize them again.

The clause on which the claim is based is a war risk clause, and it was submitted on behalf of the charterers that it must be restricted to orders or directions given (a) to preserve ship or cargo from risks of war or apprehension of the same or (b) by or on behalf of a government in the exercise of its belligerent rights. I see no ground for implying such restrictions. Acts of piracy simply by a government (if such could be contemplated) would no doubt be outside the clause, but there is no finding to that effect. On the contrary, the award finds that hostilities were taking place in a somewhat spasmodic fashion between the (communist) Government of the Republic of China and those carrying on the administration of and in fact governing Formosa. Those are symptoms of war, and the risks of such hostilities were apparently sufficient to establish wage increases for the crew whilst the vessel was in Chinese or Korean waters.

The clause then has to be construed and applied. I would read the words "by the government of the nation under whose "flag the vessel sails or by any other government" as referring to the same type of government, not to contrasting or different types. The clause refers to national governments, not to a subservient authority such as a municipal or provincial government. The qualities or character required by the body giving the order or on whose behalf it was given or purported to be given must, therefore, include essentially the exercise of full executive and legislative power over an established territory.

The effect of the clause is, in my view, no more than "by "the government of the nation under whose flag the vessel sails, "or by any government other than the government of the flag of "the vessel," in each case referring to a national government. That is, the provision is not restricted to the orders of the government of the vessel's flag (from whom, in conditions of war, orders or directions might in the first place reasonably be expected to come). The clause, however, applies to an order or direction of a government and, if the umpire's first finding is right, I would regard the second finding as irrelevant, as it matters not that the government in question does not embrace the whole of the Chinese race or the whole of China, as it apparently claimed to do.

There would, therefore, I apprehend, have been little if any controversy on the main issue if the Foreign Office of the British Government, from whom evidence was sought, had, at the date of the arrest and deviation, recognized the so-called Nationalist Government of China as being either a de jure or de facto government of the Republic of China, or in fact the Government of Formosa as a supreme or sovereign and not subservient government.

In so far as recognition of the Italian Government might matter (and on behalf of the shipowner it was argued that the Italian Government's view prevailed or was of vital importance as evidence) the Italian Government did recognize the Government in Formosa at the material time as the Government of the Republic of China. On the contrary, however, the British Foreign Office stated that Her Majesty's Government did not recognize that any government was located in Formosa in July and August, 1953.

If the view of the Foreign Office is not to be held as conclusive, or as exclusive of all other evidence, it was not submitted by the charterers that there was no evidence to establish or justify the finding in the award. It was, however, strongly submitted that the court could not go behind or beyond the Foreign Office statement.

The contract is a commercial document in common use by traders of many nationalities. It is described as a uniform general charter, apparently prepared, issued and recommended by the Documentary Council of the Baltic and White Sea Conference, and adopted by the Documentary Committee of the Chamber of Shipping of the United Kingdom. Of the parties to this charterparty, the shipowner is an Italian, and the charterers are a Czechoslovakian company. The charterers, by clause 40, had the right to transfer the charterparty to a German party but the original charterers were to remain liable for its right and true fulfilment. The charterparty provided for arbitration in London in the event of any dispute, and that permitted the present application to the court under section 21 (1) (*b*) of the Arbitration Act, 1950. The parties were agreed that the proper law of the charterparty was English law.

As a matter of construction of the charterparty, an ordinary trading or commercial contract, there would seem to me to be no ground for saying that the authority giving the orders or directions has to be a government recognized as such by Her Majesty's Government here. It does not say so and I see no circumstances which require such a construction or which would give rise to any implication to that effect. The umpire, in my judgment, has not erred in that respect.

Is there a rule of law which restricts the evidence to be considered to that provided by the Foreign Office, or which precludes the tribunal of fact from finding that there was a government in Formosa on all the evidence which was adduced?

It was urged on behalf of the charterers that the umpire erred in not treating the Foreign Office statement as final and conclusive, and reliance was placed on *White, Child and Beney* v. *Simmons*,[1] and *Duff Development Company Ltd.* v. *Government of Kelantan*,[2] and other cases. In my judgment, the authorities, so far as they have been cited or are known to me, do not establish the proposition contended for and did not require the umpire to disregard any of the evidence put before him as to whether or not there was a government in Formosa.

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[1] (1922) 11 Ll.L.Rep. 7; 38 T.L.R. 616.

[2] [1924] A.C. 797; 40 T.L.R. 566.

It seems to me to be a very different question from a sovereign seeking immunity from the jurisdiction of our courts. The principle of the *Kelantan* case [2] was concisely stated by Lord Dunedin [3] in these words: "It seems to me that once you trace "the doctrine for the freedom of a foreign sovereign from interference by the courts of other nations to comity, you necessarily "concede that the home sovereign has in him the only power "and right of recognition. If our sovereign recognizes and "expresses the recognition through the mouth of his minister "that another person is a sovereign, how could it be right for the "courts of our own sovereign to proceed upon an examination of "that person's supposed attributes to examine his claim and, "refusing that claim, to deny to him the comity which their own "sovereign had conceded?" It may well be undesirable that in such a matter a conflict should arise between Her Majesty's Government and a British court. But even on such an issue as that, Lord Sumner, after stating [4] "a foreign ruler, whom the "Crown recognizes as a sovereign, is such a sovereign for the "purposes of an English court of law, and the best evidence of "such recognition is the statement duly made with regard to it "in His Majesty's name. Accordingly where such a statement "is forthcoming no other evidence is admissible or needed," continued later in his speech to say [5]: "There may be occasions, "when for reasons of State full, unconditional or permanent "recognition has not been accorded by the Crown, and the "answer to the question put has to be temporary if not temporising, or even where some vaguer expression has to be used. "In such cases not only has the court to collect the true meaning "of the communication for itself, but also to consider whether "the statements as to sovereignty made in the communication "and the expressions 'sovereign' or 'independent' sovereign "used in the legal rule mean the same thing. Best C.J. says in "*Yrisarri* v. *Clement* [6] that recognition is conclusive, but, if "there is no recognition yet given, the independence becomes "matter of proof. I conceive that, if the Crown declined to "answer the inquiry, as in changing and difficult times policy "might require it to do, the court might be entitled to accept "secondary evidence in default of the best, subject, of course, "to the presumption that, in the case of a new organization,

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[2] [1924] A.C. 797.

[3] [1924] A.C. 797, 820.

[4] Ibid. 824.

[5] Ibid.

[6] (1825) 2 C. & P. 223, 225.

"which has de facto broken away from an old State, still existing "and still recognized by His Majesty, the dominion of the old "State remains unimpaired until His Majesty is pleased to "recognize the change."

In the *Simmons* case,[7] on which both parties seemed to rely, a question arose whether a claim for loss of insured property was a loss or confiscation by the government of the country in which the property was situated. The matter arose at the time of the Russian revolution. Roche J.[8] had held that the evidence, from all sources, had not established that the Russian Soviet Republic was at the time of the loss recognized as a sovereign government and that the claim succeeded as the loss was a loss "by "rebellions, military or usurped power" within the meaning of the policy. The loss or confiscation by the government would have defeated the claim as outside the policy. Apparently the Soviet Authority was not recognized by our Government at the time of the loss, but was recognized at a later date, and the Court of Appeal held in these circumstances that the court could look at all the facts and see whether the government recognized as the de facto government of Russia was or was not the de facto government of Russia at the earlier material date. The British Foreign Office had declined to state the precise date at which the existing Soviet Authority came into being as a government, and therefore the Court of Appeal held that it became a question of fact as to when that government first began to exist as a government, and that the court was entitled to give effect to the evidence even if it was inconsistent with the opinion given by the Foreign Office (*per* Atkin L.J.).[9]

Apparently, the government situated and functioning in Formosa was at one time recognized by this country, and it does not follow because recognition has ceased that the government, once recognized, has in any way altered its activities or lost such powers and authority as it had been exercising. Without the recognition of our Government in the *Simmons* case [10] it might well have been impossible for the court to have found on the evidence that the usurping forces had reached such ascendancy that they had supplanted the existing government. It was held that the usurping forces had supplanted the existing government at a time when our country had not recognized the substitution, and it does not appear to me to be an authority for the proposition that if there is no recognition there is no government. Nor would it seem that recognition or non-recognition would in any way affect the risk of a vessel being accosted on her voyage.

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[7] (1921) 7 Ll.L.Rep. 187; 8 Ll.L. Rep. 170; (1922) 10 Ll.L.Rep. 278; 11 Ll.L.Rep. 7; 38 T.L.R. 616.

[8] 10 Ll.L.Rep. 278.

[9] 11 Ll.L.Rep. 7, 13, 14.

[10] 11 Ll.L.Rep. 7.

I would hold that the umpire was entitled to approach the question in the same manner as Goddard J. did in *Kawasaki Kisen Kabushiki Kaisha of Kobe* v. *Bantham Steamship Co. Ltd.*,[11] approved by the Court of Appeal, and that the reasoning of the judgment of Greene M.R.[12] is largely applicable to this case. It was held there that the question whether on the true construction of the charterparty war had broken out involving Japan was not conclusively determined by the view of His Majesty's Government. Goddard J. is reported as having said[13] "that what he had to determine was what the parties meant by "the clause of the charterparty. He thought they were using "the word 'war' and intended it to be construed as war in the "sense in which an ordinary commercial man would use it. He "did not think the parties in a case of this sort were going into "the niceties of international law." And, may I add, as applicable to this case, into the niceties of diplomacy.

Other arguments were advanced on the first issue with which I do not think it necessary to deal, having regard to the conclusions already expressed. But I should record that Mr. Ashton Roskill, for the charterers, expressly kept open the point, though he could not successfully argue it in this court, that the war risk clause (2) was unenforceable, being repugnant to the fundamental obligations of the contract.

There remains for consideration the amount of freight which the shipowner is entitled to receive under the clause, which provides that in the circumstances set out, if, in compliance with any such orders or directions "anything is done or is not done, "the same shall not be deemed to be a deviation and a delivery "in accordance with such orders or directions shall be a fulfilment "of the contract voyage and the freight shall be payable "accordingly." By clause 20 of the charterparty a variety of possible voyages was contemplated with freights varying according to the destination ultimately chosen. By clause 26 a declaration of destination had to be made, "on or before passing "Aden if discharging Black Sea, on or before vessel's passing "Gibraltar for any other port." A declaration was made as to deadweight capacity under clause 36. But in the events no declaration was made as to a discharging port, and the shipowner claims on the basis of the lowest rate of freight provided for by clause 20.

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[11] [1939] 2 K.B. 544, 549; 55 T.L.R. 503; [1939] 1 All E.R. 819.

[12] [1939] 2 K.B. 544, 552.

[13] Ibid. 549.

The freight is to be paid on the basis of the fulfilment of the contract voyage. If this had been declared the claim would have been for the freight due for the declared destination and could not have been less than the minimum rate stipulated. The deviation might be of short duration, and the actual voyage might also be short, as here. But, on the other hand, the time of deviation or detention might be long, and the distance much more remote than any of the contemplated voyages. The rough goes with the smooth, and the contractual rate stands as if the contract voyage had been fulfilled.

It was argued that the phraseology of part (1) of the war risks clause was different from part (2) with regard to freight. But, as I read it, it likewise gives the shipowner the freight appropriate to the contractual voyage as originally ordered, notwithstanding that the ship has been diverted to another port covered by the charterparty.

For these reasons I hold that the shipowner is entitled to recover the sum claimed and provisionally awarded to him by the award and that the charterers are not entitled to recover at all on their counterclaim.

Award affirmed.

Solicitors: *Constant & Constant; Stokes & Mitcalfe.*

J. F. L.

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[No. L. 1846.]

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April 11, 24.

Jenkins and Hodson L.JJ., and Lloyd-Jacob J.

Landlord and Tenant — Act of 1954 — *Business premises* (*Security of tenure*)—*Shop and dwelling-house let together—Premises within Rent Acts—Sublease of part of shop—Application by subtenant for new tenancy—Notice of objection by tenant as immediate "landlord"—Notice to quit by superior landlord—Whether statutory tenant "landlord" for purposes of Act of* 1954—*Whether proceedings properly constituted—Landlord and Tenant Act,* 1954 (2 & 3 *Eliz.* 2, *c.* 56), *s.* 44.

Licence or tenancy—Exclusive occupation—Shop—Occupation of part.

The tenant of premises, comprising a dwelling-house and a shop, opposed an application for the grant of a new tenancy which had been made by his subtenant, who occupied part of the shop. Before the application was heard the superior landlords served a notice to quit on the tenant and thereafter, as the premises were within the protection of the Rent Acts, he remained in possession as a statutory tenant. The superior landlords were notified of the hearing of the application but were not joined as respondents and did not appear:—

Held, (1) that the applicant had on the facts a tenancy of her part of the shop and not a mere licence to occupy, and was entitled to the protection of the Landlord and Tenant Act, 1954.

(2) That until the contractual tenancy of the whole premises had been determined, the tenant was as regards the applicant a "landlord" within the definition contained in section 44 of the Act of 1954, but that on the determination of that tenancy, he was no longer a "landlord" as so defined, since a statutory tenant could not be a "landlord" within the definition.

(3) That the "landlord" was a necessary respondent to the application, and that as the tenant had ceased to be a "landlord" before the date of the hearing and the superior landlords had not been joined, the proceedings were not at that date properly constituted.

X.L. Fisheries Ltd. v. *Leeds Corporation* [1955] 2 Q.B. 636; [1955] 2 All E.R. 875 applied.

APPEAL from Judge Norris sitting at Wolverhampton County Court.

The respondent, Bert Muggleton, was a weekly tenant of premises known as 94, Common Road, Wombourn, Staffordshire, comprising a dwelling-house and a shop. He lived in the dwelling-house and occupied part of the shop for the purposes of his business as a plumber, the remainder of the shop being occupied by the applicant, Helen Piper, for the purposes of her business as a dealer in fancy goods on payment of 7s. 6d. per week to the respondent. On August 20, 1955, the respondent served on the applicant a notice purporting to terminate her "tenancy" and stating that he would oppose any application to the court for the grant of a new tenancy under Part II of the Landlord and Tenant Act, 1954, on the ground that he required the premises for the purposes of a business to be carried on by him. That notice was expressed to be pursuant to section 25 of the Act of 1954.[1] On October 14, 1955, the applicant replied

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[1] Landlord and Tenant Act, 1954, s. 23: "(1) Subject to the provisions of "this Act, this Part of this Act [Part "II] applies to any tenancy where "the property comprised in the tenancy is or includes premises which "are occupied by the tenant and are "so occupied for the purposes of a "business carried on by him or for "those and other purposes."

S. 24: "(1) A tenancy to which "this Part of this Act applies shall

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pursuant to the same section notifying the respondent that she would not be willing to give up possession at the date of the termination of the notice. On December 14, 1955, she applied to the county court under section 24 (1) of the Act of 1954 for a new tenancy, joining as respondent to her application her landlord. On January 5, 1956, the respondent lodged an answer opposing the grant of a new tenancy on the ground stated in his notice under section 25.

On January 21, 1956, a notice to quit was served on the respondent by his landlords, Edward Brookes and Mrs. Alice V. Brookes. That notice expired on January 30, 1956. As the premises were admittedly within the protection of the Rent Acts, the respondent who remained in possession after the expiry of the notice to quit, did so as a statutory tenant. The application

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"not come to an end unless terminated in accordance with the provisions of this Part of this Act; and, subject to the provisions of section 29 of this Act, the tenant under such a tenancy may apply to the court for a new tenancy—(*a*) if the landlord has given notice under the next following section to terminate the tenancy, or (*b*) if the tenant has made a request for a new tenancy in accordance with section 26 of this Act."

S. 25: "(1) The landlord may terminate a tenancy to which this Part of this Act applies by a notice given to the tenant in the prescribed form specifying the date at which the tenancy is to come to an end. . . . (6) A notice under this section shall not have effect unless it states whether the landlord would oppose an application to the court under this Part of this Act for the grant of a new tenancy and, if so, also states on which of the grounds mentioned in section 30 of this Act he would do so."

S. 30: "(1) The grounds on which a landlord may oppose an application under subsection (1) of section 24 . . . are such of the following grounds as may be stated in the landlord's notice under section 25 of this Act or, as the case may be, under subsection (6) of section 26 thereof, that is to say:— . . . (*g*) subject as hereinafter provided, that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence."

S. 44: "(1) Subject to the next following subsection, in this Part of this Act the expression 'the landlord', in relation to a tenancy (in this section referred to as 'the relevant tenancy'), means the person (whether or not he is the immediate landlord) who is the owner of that interest in the property comprised in the relevant tenancy which for the time being fulfils the following conditions, that is to say—(*a*) that it is an interest in reversion expectant (whether immediately or not) on the termination of the relevant tenancy, and (*b*) that it is either the fee simple or a tenancy which will not come to an end within 14 months or less by effluxion of time or by virtue of a notice to quit already given by the landlord, and is not itself in reversion expectant (whether immediately or not) on an interest which fulfils those conditions. (2) References in this Part of this Act to a notice to quit given by the landlord are references to a notice to quit given by the immediate landlord."

was heard on February 3, 1956, and the first question raised was whether the applicant's occupancy was a tenancy to which the Act of 1954 applied or whether it was a mere licence to occupy. The part occupied by her consisted of an area bounded by and including one of the two shop windows and a counter running from the window to a point about four feet from the back wall, and connected with the back wall by a low barrier and wicket gate. The whole of the space between the counter and barrier and side wall of the shop was occupied exclusively by the applicant. The part between the part occupied by her and the counter standing on the part occupied by the respondent was used in common by them and their respective customers as a means of access; it also served as a way through to the respondent's living room at the back of the shop. The respondent kept a key of the door leading into the shop from the street but the applicant was given a rent book and treated as a tenant and throughout the correspondence leading up to the proceedings the respondent's solicitors had referred to her as a tenant.

The county court judge found that the applicant had a tenancy of her part of the shop, but he dismissed her application on the ground that the respondent, as "landlord" within the meaning of section 44 of the Act of 1954, had established his ground of objection under section 30 (1) (*g*) of that Act.

The applicant appealed.

Geoffrey Green and N. C. H. Browne-Wilkinson for the applicant. At the date when the application was heard the respondent was no longer "the landlord" for the purposes of the Act of 1954 and, therefore, he had no locus standi to object to the grant of a new tenancy. At the date of the hearing he was in possession as a statutory tenant of the part occupied by him, but he could not show that he intended to occupy the part of the shop occupied by the applicant for the purposes of his own business as required by section 30 (1) (*g*). [Reference was made to *Gee* v. *Hazelton.*[2]]

[JENKINS L.J. Were Mr. and Mrs. Brooks given notice of this appeal? They did not attend the hearing in the county court, but the applicant failed there and they may have been satisfied with that result. They should not be shut out, for if a new tenancy is to be granted they are the only persons who can grant it.]

They were not given notice of the appeal, but they have already been given the chance to become parties in accordance

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[2] [1932] 1 K.B. 179; 47 T.L.R. 528.

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with the rules and have chosen to do nothing. It might cause hardship if a tenant had to start again in cases such as this.

John Hobson for the respondent. The applicant is not entitled to a new tenancy under the Act of 1954 unless she was a tenant: see *Wheeler* v. *Mercer*.[3] The county court judge seems to have thought that, because the applicant had had a rent book and had been treated by the respondent's solicitors as being a tenant, he was precluded from holding that she was not a tenant but a mere licensee. But even if those factors had been conclusive as between the respondent and the applicant, obviously they could not bind the superior landlords. Nor are they conclusive as between the respondent and the applicant, for a rent book may be used for convenience when the occupant has only a licence, and the solicitors may well have been mistaken as to the nature of the applicant's interest. Whether the occupant of premises is a tenant or a licensee depends on whether he has the right to exclusive possession. There may, however, be exceptional cases where even a grant of the right of exclusive possession does not amount to a tenancy: see *Gee* v. *Hazelton*,[4] where the hereditament in question was incapable of being the subject-matter of a tenancy. Where the person who alleges that he is a tenant is in joint occupation of a single room with the alleged landlord, the "tenant" must prove that the "landlord" has abandoned control of the part occupied by the "tenant." In the present case the evidence is inconclusive. The relevant time for considering whether an interest is a tenancy or not is when the right is granted: *Helman* v. *Horsham and Worthing Assessment Committee*.[5] The material time for deciding who is "the landlord" for the purposes of the Act of 1954 is either when the landlord gives notice under sections 25 or 26 (*X.L. Fisheries Ltd.* v. *Leeds Corporation*[6]) or when the tenant's request is made (*Diploma Laundry Ltd.* v. *Surrey Timber Co. Ltd.*[7]), or possibly the landlord must show that he is "the landlord" at both those dates. "The landlord" must mean the same in both sections 30 and 31. Different criteria apply in some proceedings under the Rent Acts where the relevant time is when the order is made.

If a landlord serves a notice of objection and then sells his interest he will have preserved his right to prevent the grant of a new tenancy. In this case it has been conceded that the respondent's notice of objection was valid at the time of service. It is immaterial that by the time of the hearing the interest of "the landlord" who served the notice may have been wholly extinguished.

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[3] [1956] 1 Q.B. 274; [1955] 3 All E.R. 455.

[4] [1932] 1 K.B. 179.

[5] [1949] 2 K.B. 335; 65 T.L.R. 291; [1949] 1 All E.R. 776.

[6] [1955] 2 Q.B. 636; [1955] 2 All E.R. 875.

[7] [1955] 2 Q.B. 604; [1955] 2 All E.R. 922.

[JENKINS L.J. But the person who objects to the granting of the new lease must be capable of granting one.]

Everyone interested must be served with notice of the hearing and they will have an opportunity of appearing and objecting. If by the date of the hearing the landlord who served the notice is a statutory tenant he is not necessarily unable to show that he intends to occupy the premises for the purposes of his business although the right by virtue of which he then occupies is different from that subsisting when he served his notice of objection by virtue of which he is entitled to be heard at the hearing. The respondent is the statutory tenant of the whole premises for, although part was used by the applicant for the purposes of her business, the respondent retained control over the whole premises and the part, if any, of which the applicant had the right to exclusive possession was ill-defined. [Reference was made to *Rogers* v. *Hyde* [8] and *Gidden* v. *Mills*.[9]] If it is sought to establish that a part of a room is outside the protection of the Rent Acts that part must be clearly defined.

The time at which the extent of the respondent's statutory tenancy must be ascertained is normally the time when the superior landlord seeks possession. If the respondent, as is not conceded, was a statutory tenant only of the part used by him, he might nevertheless resume possession of the part occupied by the applicant when her interest came to an end.

G. Green in reply. The part of the premises occupied by the applicant is clearly capable of being the subject-matter of a grant and the county court judge found facts which he considered indicated sufficiently that she had a tenancy of that part. In order that the respondent may establish the ground of objection on which he relies he must show that he had a tenancy at the date of the hearing. A statutory tenant cannot be "the landlord" for the purposes of the Act of 1954.

Cur. adv. vult.

April 24. JENKINS L.J. The judgment I am about to read is the judgment of the court. [His Lordship stated the facts and continued:] On the footing that the occupation by Miss Piper (hereafter called the applicant) of her part of the shop was that of a tenant and not merely that of a licensee (a point which has been the subject of some controversy), it seems reasonably plain that as matters then stood her tenancy of her part of the shop was a tenancy to which Part II of the Landlord and Tenant Act, 1954, applied (see section 23) and that Mr. Muggleton (hereafter called the respondent) was in relation to that tenancy "the landlord" within the meaning of Part II of the Act.

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[8] [1951] 2 K.B. 923; [1951] 2 All E.R. 79.

[9] [1925] 2 K.B. 713.

The application had been preceded by a notice to the applicant from the respondent to terminate her tenancy of her part of the shop pursuant to section 25 of the Act, to which she had duly replied pursuant to the same section notifying the respondent that she would not be willing to give up the property comprised in her tenancy at the date of termination. At this stage, therefore, it would seem that (always assuming that she did have a tenancy of her part of the shop) the application joining Mr. Muggleton as respondent was a properly constituted proceeding under the Act.

In due course the respondent lodged an answer dated January 5, 1956, opposing the grant of a new tenancy on the ground, which had been duly stated in his notice under section 25, that on the termination of the current tenancy he intended to occupy the premises for the purposes of a business to be carried on by him in them, this being ground (g) of the grounds of objection permitted by section 30 (1) of the Act. It is not, we think, seriously disputed that if the hearing had taken place at this point of time the respondent, being "the landlord" in relation to the applicant's tenancy if such it was, and not being subject to the disqualification imposed by section 30 (2), could have made good this ground of objection, thereby defeating her claim to a new tenancy (see section 31 (1)). But the hearing did not take place until February 3, 1956, and in the meantime (that is to say on January 21, 1956) the superior landlords, Mr. and Mrs. Brookes, gave the respondent notice to quit No. 94 expiring on January 30, 1956. There is no dispute as to the validity of that notice, and the result of it was that, inasmuch as No. 94 was admittedly a dwelling-house to which the Rent Acts applied, the respondent had by the date of the hearing become a mere statutory tenant, his statutory tenancy extending either to the whole of the premises or to the premises other than the part of the shop occupied by the applicant. The change thus brought about in the status of the respondent meant that on the former view of the extent of his statutory tenancy the respondent at the date of the hearing could only be " the landlord " for the purposes of Part II of the Act if a mere statutory tenant is capable of being " the landlord " for those purposes; while on the latter view of the extent of his statutory tenancy it seems plain that the respondent at the date of the hearing could not be " the landlord " for those purposes, since he could not even claim Rent Act protection in respect of the relevant part of the premises, that is to say, the part of the shop occupied by the applicant. We were told by counsel that the superior landlords were duly served with notice of the application; but they did not attend and were not represented at the hearing.

The judge, with some reluctance, found himself constrained to hold that the applicant had a tenancy of her part of the shop and not a mere licence to occupy it. In the circumstances, we do not see how he could well have held otherwise. We think the part of the shop of which the applicant had exclusive possession was sufficiently defined to make it in law a possible subject of a tenancy. [His Lordship described the premises as set out above and continued:] We do not think the possibility of a tenancy is negatived by the circumstance that the area between the applicant's part and the counter standing on the respondent's part was used in common by themselves and their respective customers as a means of access, and served also as a way through to the respondent's living room at the back of the shop, nor do we think that a tenancy is necessarily negatived by the circumstance that the respondent kept the key of the door leading into the shop from the street. As the judge observed, the applicant was given a rent book and treated as a tenant. One may amplify that by saying that throughout the correspondence leading to the present proceedings the respondent's solicitors consistently asserted that the applicant was his tenant, and that it was only on the footing that she was his tenant that he could give her the notice of termination under section 25 of the Act to which we have already referred. From that notice the subsequent proceedings under the Act resulted, and those proceedings would, of course, have been a mere nullity if in truth the applicant was not a tenant at all. In these circumstances we think the judge was right in concluding that the applicant must be regarded as a tenant and not as a mere licensee.

Dealing with the matter on that footing, the judge nevertheless dismissed the application for a new tenancy, and he did so apparently on the grounds (*a*) that the respondent was at the date of the hearing a statutory tenant of the whole of the premises, including the applicant's part of the shop; (*b*) that by virtue of such statutory tenancy he was " the landlord " within the meaning of section 44 of the Act; and (*c*) that he had established his ground of objection under section 30 (1) (*g*) of the Act, that is to say, that he intended to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein. From such dismissal the applicant now appeals to this court, and we think it can at all events be said in her favour that if the judge was right in dismissing her application, the grounds on which he did so were wrong. As we have said, we think that at the outset of the proceedings the respondent was " the land-" lord " within the meaning of section 44, but when he ceased to be a contractual and became a statutory tenant, which change of status had taken place before the hearing, we think he ceased to be " the landlord," whether or not his statutory tenancy extended to the applicant's part of the shop. It is axiomatic that a so-called " statutory tenant " has no interest in the premises, but merely a personal right to be allowed to remain in occupation of them. We think it follows that a statutory tenant cannot be " the landlord " within the meaning of section 44. [His Lordship read section 44 (1) and (2) and continued:]

A statutory tenant cannot, in our view, bring himself within this definition, because he is not the owner of any interest in the property. Moreover, if the applicant must be held to be a tenant of her part of the shop, as, agreeing in this respect with the judge, we think she must be, then inasmuch as her part of the shop is used wholly for business purposes, it would seem to follow that the respondent cannot claim in relation to that part of the premises even the personal right of continuance in possession conferred on a so-called statutory tenant: see *Gidden* v. *Mills*.[1] It would, moreover, appear that the position might well be the same if the applicant's interest were to be regarded as that of a licensee with an exclusive right to possession of her part of the shop: see *Gee* v. *Hazleton*.[2] But we prefer to base ourselves on the more general ground that, for the reason already stated, a so-called " statutory tenant " cannot be " the " landlord " within the meaning of section 44.

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[1] [1925] 2 K.B. 713.

[2] [1932] 1 K.B. 179; 47 T.L.R. 528.

Counsel for the respondent urged upon us what we may describe as the principle of "once the landlord always the landlord." He submitted that as the respondent was "the landlord" at the respective dates of his notice to terminate under section 25, the applicant's counternotice of unwillingness to give up possession, her application to the court, and his answer to that application, he remained "the landlord" at the date of and for the purposes of the hearing, even though he had in fact by that time ceased to be such. On this view, once the person then answering the description of "the landlord" has given the tenant notice to terminate under section 25, or at latest once such a person has put in an answer to the tenant's application for a new tenancy, he continues to be "the landlord" for the purposes of proceedings under Part II of the Act, even though he may before the hearing have died or become bankrupt or assigned his interest or suffered ejectment.

We cannot accept this. We think it is necessary that at every stage of the proceedings down to final judgment the person claiming to be or joined as being "the landlord" should in fact answer that description according to the statutory definition. If at any stage there is a change of interest by virtue of which one person ceases to be and another becomes "the landlord," then we think that that other person becomes "the landlord" for the purposes of all further steps. We are fortified in this view not only by the untoward results which would otherwise ensue, but also by the use of the words "for the time being" in section 44 (1); and we think it is, if anything, supported by the reasoning in the judgment of Evershed M.R. in *X.L. Fisheries Ltd.* v. *Leeds Corporation.*[3] The incoming "landlord" must, we think, be bound by the acts or omissions of his predecessor while answering that description (see *per* Parker L.J. in the case just cited [4]), and that may well preclude any effective opposition on his part, save as regards the terms of the new tenancy. Nevertheless, it seems to us reasonably plain from the Act and rules that "the landlord" in the sense we have indicated is a necessary respondent to the tenant's application for a new tenancy, and that if the person joined as "the landlord" ceases to be such before the hearing then the proceedings cease to be properly constituted.

Mr. Greene, appearing for the applicant, argued that the respondent on becoming a mere statutory tenant ceased to be "the landlord" as defined by section 44 and, therefore, had no locus standi to object to the grant of a new tenancy under section 30 (1) (*g*). So far we think he was right. But he went on to submit that, even so, the proceedings were properly constituted, inasmuch as the superior landlords had been duly served with notice of the proceedings, though they elected not to appear or be represented, and consequently, that an order for the grant of a new tenancy to the applicant ought to have been made, as it were, by default. We cannot agree. The proceedings were essentially proceedings between the tenant as applicant and the landlord as respondent, and once the respondent ceased to be "the landlord," then pending the substitution or addition of his successor or successors as respondents there was no properly constituted proceeding in which the superior landlords could intervene. They may well have thought that by giving notice to quit to the respondent they had effectively defeated the applicant's application as against the respondent, or, to put it the other way round, the respondent's locus standi as respondent to the application; and that to make the proceedings effective they must be added or substituted as respondents. It seems to us that the superior landlords would have been right in so thinking as, so far as the information before us goes, it would seem that they became "the landlords" on the reduction of the respondent's status to that of statutory tenant.

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[3] [1955] 2 Q.B. 636; [1955] 2 All E.R. 875.

[4] [1955] 2 Q.B. 636.

In the result, we do not see how we can well accede to the applicant's claim that we should substitute for the judge's order dismissing her application, an order for the grant of a new tenancy. On the other hand, if we dismiss the appeal we can, in our view, only do so on the ground that the applicant's proceeding was at the time of the hearing not properly constituted, and not on the ground that the respondent had duly established his objection under section 30 (1) (*g*), for in the view we take he had no locus standi to object. On the whole, we think we should at the option of the applicant either dismiss the appeal on the ground we have stated or, on her undertaking by her counsel to take the necessary steps to join the superior landlords as respondents to her application, discharge the judge's order and remit the matter to him for rehearing after such joinder has been effected. The procedure regarding applications under Part II of the Act is governed by Ord. 40 of the County Court Rules, and we find nothing to exclude the application to that order of the provisions of the County Court Rules, Ord. 5, rr. 36 and 37, regarding change of parties. It is to be noted that in the County Court Rules "plaintiff" includes "applicant" and "defendant"

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includes "respondent" (see Ord. 49, r. 2), also that rules 36 and 37 of Ord. 5 refer to "matters" as well as "actions."

[Counsel for the applicant said that she would prefer to undertake to join Mr. and Mrs. Brookes, and have the case remitted to the county court.]

Case remitted to county court after joinder effected.

Solicitors: *Stafford Clark & Co. for William Wright & Son, Dudley; Sharpe, Pritchard & Co. for H. Ernest Sargent & Son, Wolverhampton.*

E. D.

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Havers J.

ASHDOWN v. SAMUEL WILLIAMS & SONS LTD. AND ANOTHER.

[1954 A. No. 2327.]

Licensor and Licensee — Special terms of licence — Warning notices — Liability of licensor for injuries to licensee—Dock estate—Part let to tenants and part retained in occupation of owners—Access to tenant's premises obtainable only over estate—Right of way giving access — Crossed by railway lines — Short cut — Used by tenant's employees with knowledge of owners — Employee injured through negligence of owner — Liability of owners — Effect of notices disclaiming liability for injury caused by owners' negligence.

Negligence—Safe system of work—Access to place of work—Employer's premises wholly surrounded by private land—No means of access from public highway—Duty of employer to provide safe route to premises.

Industrial premises occupied by the second defendants were situate on part of a large dock estate and leased from the first defendants, owners and in control of the dock estate. The premises were wholly surrounded by the dock estate, over part of which the second defendants' employees necessarily had to pass to obtain access to their place of work. One route was by a right of way demised to the second defendants by their lease for their use and for the use of their workpeople coming and going from their place of work. It led from the main road over a private road which was crossed at various points by railway lines and on which railway wagons were shunted from time to time. There was also a short cut, passing over property occupied by the first defendants, crossed by a number of railway lines, which the second defendants' employees had used for many years, with the knowledge of their employers, and with the knowledge of the first defendants who had never objected to such user. Notices were posted by the first defendants at various points over the estate. One in particular (notice "A") was posted on the private road, at a point where it was visible to those using the short cut. It was headed "Warning," and its terms were to the effect that the road was private property and that all persons using it were there at their own risk and should have no claim against the first defendants for any injury or damage caused to them, whether due to the first defendants' negligence or breach of duty. A further notice (notice "B") posted nearby and visible to those using the right of way, was in similar terms, but specifically gave warning of engines and trucks standing on the railway lines.

The plaintiff, an employee of the second defendants, used the short cut one morning to reach her place of work. While crossing a railway line and before reaching her destination she was knocked down and injured by railway trucks which were being shunted along the line. The plaintiff, in evidence, admitted that she had read the first few lines of notice "A" and could have read the rest of the notice:—

Held, (1) that the plaintiff, while using the short cut, was a licensee upon the first defendants' land, but that she was bound by the terms of notice "A" in so far as she had read them, and equally bound by the rest of its terms if she had negligently or intentionally refrained from reading them, and that therefore she was a licensee upon the terms of that notice and the first defendants were entitled to rely upon it as a defence even though they had been guilty of negligence.

(2) That, although in the circumstances it was sufficient for the first defendants to rely on the terms of notice "A," the plaintiff was also bound by notice "B" as it was clearly visible and the first defendants had done what was reasonably necessary to give her notice of its terms, and they were entitled to rely upon it.

In those circumstances, even though the first defendants had been negligent in carrying out the shunting operation, the plaintiff's case against them failed.

Principle in *Parker* v. *South Eastern Railway Co.* (1877) 2 C.P.D. 416 applied.

(3) That it was the duty of an employer whose premises did not abut upon a highway, but were entirely surrounded by some other person's private property, to provide a means of access by which his employees could reach their place of work, and that in such a case it was the employer's duty to take reasonable care to ensure that the route was reasonably safe for his employees' use. That duty applied to the second defendants in respect of the right of way and they were also under the same duty in respect of the short cut as it was a route which they had authorized their employees to use.

(4) That, by pointing out the short cut to the plaintiff as one which she was authorized to use without warning her of its danger, they had failed in their duty towards her, and her injuries were due to their negligence as she probably would not have used the route had she been warned of its danger.

Action.

The following statement of facts is summarized from the judgment. The first defendants, Samuel Williams & Sons Ltd., were wharfingers and lightermen, mechanical engineers and contractors, who owned and controlled a large dock estate situate near the River Thames at Tilbury, south of Dagenham Dock station. Parts of the estate were let off to tenants, but parts were retained by the first defendants in their own occupation. Among their tenants were the second defendants, Wagon Repairs Ltd. Over the dock estate were a number of private roads giving access to the various occupiers. In particular a private road, known as Chequers Lane, led from the main road and ran down the centre of the estate. In addition, a number of railway lines and sidings ran in all directions and intersected the estate at many points. At various times of the day trucks were shunted over the lines into the sidings.

The second defendants had premises on part of the dock estate, which they occupied as tenants under a lease for 42 years made on July 8, 1927. The land demised to them was wholly surrounded by the dock estate except on the eastern boundary where there was a road in which was a gate through which access to their premises could have been obtained had it been kept open, but the gate was kept locked. Their employees had necessarily, therefore, to obtain access to their place of work over some part of the dock estate. A right of way over Chequers Lane was demised to the second defendants by their lease leading from the main road. It was expressed to be for the use of the second defendants and their servants and workmen and others having business with them coming and going to and from the premises, and led from the main road along Chequers Lane, over a level crossing and crossed three other railway lines before reaching the second defendants' main gate. Apart from that route there was a short cut from the main road to a side gate of the premises. That led a short way down Chequers Lane, over the level crossing and crossed a part of the estate retained by the first defendants in their own occupation. It involved crossing a number of railway lines before reaching the side entrance to the second defendants' premises. The short cut had been used by employees of the second defendants for many years, at least since 1939. The first defendants knew that they used it and had never in any way objected or taken any steps to prevent their user.

Certain notices had been posted up by the first defendants at different points of the dock estate. Two in particular (hereinafter referred to as notices " A " and " B ") were posted close to the point where Chequers Lane was crossed by the railway line. Notice " A " was erected on a board 3 ft. high and 8 ft. 3 ins. from the ground and was clearly visible to those using the short cut. It read as follows: " Notice and Warning. This property " is private property. Every person, whether an invitee or other- " wise, whilst on the said property is there entirely at his own " risk and must be deemed to take the said property with every- " thing thereon as he finds it with notice of the nature, condition " and state thereof and he shall not have or make any claim for " injury or damage against Messrs. Samuel Williams and Sons, " Ltd., howsoever such injury and/or damage may be occasioned, " or any of their assigns, or their respective lessees or tenants, " or their respective servants agents or workmen whether or not " such injury or damage is in any way whatsoever due to any " negligent act, breach of duty, default and/or omission on the " part of Messrs. Samuel Williams and Sons, Ltd. and/or any " of their assigns or their respective lessees or tenants or their " respective servants agents or workmen. All persons are only " allowed to be on the said property on the distinct understanding " that they do so entirely at their own risk. Samuel Williams and " Sons Ltd. W. J. Crafter, Secretary."

Notice " B," which was close by, and was visible to persons using the long route (the right of way), was also painted on a board and was headed " Warning," and read as follows: " This road is a " private road and the railway lines and tracks crossing the said " road and land to the south of Dagenham Dock Station are the " property of Samuel Williams and Sons Ltd. Every person whilst " on the said road, lines, tracks or land is there at his own risk and " must beware of engines, trucks and other vehicles whether on " or off the said lines or tracks and take the said land and road " with everything thereon as he finds them with notice of the " nature, conditions and state thereof, and he shall not have or " make any claim for injury or damage against Samuel Williams " and Sons Ltd. or any of their assigns or their respective lessees " or tenants or their respective servants agents or workmen " whether such injury or damage is in any way due to negligence " or not. Persons are allowed to use the said road and land on " this understanding entirely at their own risk. Samuel Williams " and Sons Ltd. W. J. Crafter, Secretary." There were three other notices along Chequers Lane, warning that there were railway lines a little farther along the lane.

In April, 1948, the plaintiff, Violet Ashdown, a widow, aged 53, was engaged by a representative of the second defendants to work as a canteen assistant and part-time cleaner in their premises. The short cut to the premises had been pointed out to her. She also knew of the long route demised by the lease. On the morning of September 8, 1949, she took the short cut and while crossing the railway line she was caught by the buffer of one of three trucks which were being fly-shunted back along the line, knocked down and injured. On a claim for damages for negligence against both defendants, the plaintiff alleged that at the interview in April, 1948, at which she was engaged, the second defendants' representative had indicated to her the short cut across the first defendants' property to the main road and had in fact accompanied her along it; that that route, to the knowledge of the second defendants, had been used by their servants for a period of approximately 20 years immediately preceding the accident; that the route crossed a single track railway line, the property of the first defendants upon which railway trucks were habitually left standing for periods of up to one week; and that she was injured by one of three trucks owing to the negligence of the defendants, or one of them, or their respective servants or agents. As against her employers, the second defendants, she alleged (a) that they expressly or impliedly assented to her use of the route, the dangers whereof were, or ought to have been, known to them; and (b) that they failed to provide and enforce the use by their servants of a safe route to their premises. As against the first defendants, the negligence alleged was that they failed to keep a proper lookout; failed to give any or any sufficient warning of the approach of the railway trucks; and failed to provide any or any adequate supervision of the shunting operation.

The second defendants denied that the accident was caused by their negligence and contended that if the plaintiff used the alleged route at the material time and place she did so of her own choice and for her own convenience; furthermore, that in so doing she was herself guilty of negligence.

The first defendants admitted that the plaintiff was struck by a truck while attempting to cross a railway line on their property, but contended that the plaintiff was not using the proper route demised to the second defendants by their lease and that in crossing the line she was a trespasser. They denied that they were negligent and alleged negligence on the part of the plaintiff. Alternatively, they contended that any use made by the plaintiff of their land for her own purposes was subject to the terms of the notices "A" and "B" standing on their land.

R. F. Levy Q.C. and *Neil McKinnon* for the plaintiff.

Geoffrey Lawrence Q.C. and *David Croom-Johnson* for the first defendants. The first defendants did all that they reasonably could to warn the plaintiff of the danger. What they did was sufficient to inform persons who came upon their land that they came there upon terms. Reliance is placed on the notices, the terms of which were plain. There is no authority directly on the point, but it is submitted that the principle in *Parker* v. *South Eastern Railway Co.*,[1] which was a case in contract, applies equally in the case of licence. In that case the plaintiff brought an action to recover the value of a bag deposited in a railway cloakroom for which he had received a ticket, on the back of which was printed a condition by which the railway company disclaimed liability for any package exceeding £10 in value. The bag was lost. The Court of Appeal held that the plaintiff was bound by the condition on the ticket, although he had not read it, and the railway company was not liable: see the judgments of Mellish and Baggallay L.JJ.[2] Applying the principle of that case to the present, the plaintiff is clearly bound not only by that part of notice "A" which she admitted she had read, but by the rest of its terms of which she had constructive notice. Moreover, she is bound by the terms of notice "B." In any event, the servants of the first defendants did not act negligently towards the plaintiff.

R. Marven Everett Q.C. and *G. R. F. Morris* for the second defendants. The argument put forward by the first defendants is adopted. Further, it is submitted that an employer has no duty of care for the safety of his employees until such time as they come on to his premises. The docks cases are not far from this case. Are shipowners under a duty to prescribe a route through the docks? The question is whether there is not only a duty to provide a route but whether there is a duty to enforce its use. Apart from special cases where it may be a term of the contract of employment that the employee shall use a certain defined route, he is entitled to go to his work by whichever way he pleases. The employer's duty is to provide for the safety of his employee during the course of his employment: see the statement in Munkman, Employer's Liability, 3rd ed., p. 69, under the heading "Limits of Employer's Duty: the Course of "Employment," which is adopted as part of this argument, and *Priestley* v. *Fowler*,[3] which contains a general statement of the employer's duty at common law; see in particular the judgment of Lord Abinger C.B.[4] The duty also exists when the employee, although not actually engaged in work, is doing something which is reasonably incidental to his day's work: see *Davidson* v. *Handley Page Ltd.*,[5] where it was unsuccessfully argued that an employee ceased to be employed while washing a teacup so that the employer ought not to be held liable for an injury she sustained through slipping on an oily duckboard. In *Clark* v. *Stephens, Sutton & Co.*[6] the owners of a ship were held not to be liable when one of their employees was injured while walking along a dock road on his way to his work on the ship. That case is distinguishable from the present because it turned on the words "out of and in the course of employment" in the Workmen's Compensation Acts. There is no authority directly on the point under consideration, but some assistance may be derived from cases where workmen are obliged to perform their work on premises other than their employer's. In *Cilia* v. *James & Sons Ltd.*[7] an employer was held not to be liable where his employee, while working as a plumber's mate in an unoccupied house, stepped on a steel plate under which there was a defective conduit and was electrocuted. Byrne J. did not follow the observations of Denning L.J. in *Christmas* v. *General Cleaning Contractors Ltd.*[8] that it was for the employer who sent his men to premises to take steps to protect them from the dangers to which he sent them, but held that the employer was under no duty to see that the premises which he did not occupy and over which he had no control were reasonably safe. If that is the position where workmen are injured in the course of their day's work, then a fortiori it is difficult to see that there can be any liability on an employer for injury to an employee who is not at work at all. In the present case the second defendants had no duty of care towards the plaintiff at the time when she suffered the accident and her claim fails in limine.

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[1] (1877) 2 C.P.D. 416.

[2] Ibid. 422, 425.

R. F. Levy Q.C. and *Neil McKinnon* in reply. As against the first defendants, the duties of an occupier of land towards persons who have been given permission to use the land are accurately and conveniently set out in *Hawkins* v. *Coulsdon and Purley Urban District Council*[9]: see in particular the judgment of Denning L.J.[10] See also *Barrett* v. *Midland Railway Co.*[11] The occupier must not act negligently towards such persons. The notices relied upon by the first defendants do introduce a puzzling aspect into the case. It is conceded that when an occupier of land gives a licence to use the land he can attach to it any conditions he thinks fit, but the question is, how does he do so? To cut down the licence he must establish that it was cut down to the knowledge of the licensee. The contract cases afford no parallel. In the present case the plaintiff could only be bound by that part of notice " A " which she had read and not by the rest of its terms or by notice " B," which she did not see. There is no reason why she should have done so.

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[3] (1837) 3 M. & W. 1.

[4] Ibid. 6.

[5] (1945) 61 T.L.R. 178; [1945] 1 All E.R. 235.

[6] (1937) 59 Ll.L.Rep. 52.

[7] [1954] 1 W.L.R. 721; [1954] 2 All E.R. 9.

[8] [1952] 1 K.B. 141, 149; [1952] 1 All E.R. 39.

As against the second defendants, it is submitted that an employer's duty towards his employee is not always the same and hard-and-fast rules cannot be laid down. Nevertheless, an employer who enters into a contract to employ a person undertakes, and it is his clear duty, to afford his employee access to the premises in which he is going to work. If he does not do so he breaks his contract. This is not a case where the employer's premises can be entered from the public highway. The plaintiff had no means of access to them at all except over the land occupied by the first defendants. The second defendants regarded it as their duty to afford a means of access for their employees, as shown by the stipulation for a right of way in their lease with the first defendants. Having undertaken to provide reasonable means of access they are bound to take reasonable steps to see that the means of access is safe. The same considerations apply to the short cut. The second defendants assented to the plaintiff's use of that route and they were under a duty to see that it was reasonably safe. By failing to do so they failed in their duty towards her.

Cur. adv. vult.

April 18. Havers J. This case raises some questions of interest on which, I was told by counsel, there was little, if any, precise authority. [His Lordship stated the facts, reviewed the evidence, and continued:] The first question I have to decide is: what was the status, in law, of the plaintiff at the time she sustained this accident? I do not think there can be any doubt

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[9] [1954] 1 K.B. 319; [1954] 1 All E.R. 97.

[10] [1954] 1 K.B. 319, 330.

[11] (1858) 1 F. & F. 361.

—in view of the long time during which the employees of the second defendants have used this short cut, without any sort of objection or protest from the first defendants, and with their knowledge—but that the plaintiff was—as were other employees of the second defendants who used this short cut—a licensee of the first defendants.

Then the difficult question arises: what were the terms of that licence? And upon that question there has been an acute controversy between the parties.

With regard to the facts, I am satisfied that the plaintiff did see notice "A," and that she saw the words "Notice and "Warning." I am also satisfied—as she herself admitted—that she only read the first few lines of the notice. I am satisfied that she knew that notice "A" referred to the dock estate; and that she knew it concerned her and others who were walking about the coal yard. I am satisfied that she knew from the notice that she was on the land of the first defendants at her own risk; and I am satisfied that the remainder of the notice, which she did not read, was clearly legible, and—as she herself admitted—could have been read by her if she had wanted to do so.

Mr. Levy admitted that insofar as she read this notice she would be bound by it; but he contended that the first part of the notice only referred to the static condition of the premises, and that in so far as she did not read the notice which dealt with the question of negligence she was not bound by it.

There seems to be no clear authority dealing with a situation like this—with regard to the extent to which a person who is a licensee upon the land of another, who sees a large notice board which she realizes is a notice relating to her and her user of the land, is bound by the terms of the notice, if she, for some reason or another (either intentionally or negligently), does not read the rest of the terms. My attention was called to *Parker* v. *South Eastern Railway Co.*,[1] which was a case of contract, where a cloak room ticket had been handed to a person who had deposited articles at the cloakroom in a railway station. The headnote reads: "On the deposit of articles at the cloak-room at a railway "station, a charge is made of 2d. for each, and the depositor "receives a ticket, on the face of which are printed the times of "opening and closing the cloak-room and the words 'See back,' "and on the back there is a notice that the company will not be "responsible for any package exceeding £10. A placard upon "which is printed in legible characters the same condition is also

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[1] (1877) 2 C.P.D. 416.

"hung up in the cloak-room. The plaintiff deposited his bag, of "value exceeding £10, in the defendants' cloak-room, paid 2d., "and received a ticket. The bag was lost or stolen. In an "action to recover its value the plaintiff swore that he took the "ticket without reading it, imagining it to be only a receipt for "the money paid for the deposit of the article, or as evidence "that the company had received the article, that he did not read "the condition at the back of the ticket, nor did he see the "notice hung up in the cloak-room. The judge left two questions "to the jury,—1. Did the plaintiff read or was he aware of the "special condition upon which the article was deposited? "2. Was the plaintiff, under the circumstances, under any "obligation, in the exercise of reasonable and proper caution, to "read or to make himself aware of the condition? The jury "answered both the questions in the negative, and judgment "was directed for the plaintiff." The defendants appealed.

There are certain passages in the judgments of Mellish and Baggallay L.JJ. to which my attention was directed. In the judgment of Mellish L.J. there appears this passage[2]: "Now "the question we have to consider is whether the railway com- "pany were entitled to assume that a person depositing luggage, "and receiving a ticket in such a way that he could see that "some writing was printed on it, would understand that the "writing contained the conditions of contract, and this seems to "me to depend upon whether people in general would in fact, "and naturally, draw that inference. The railway company, as "it seems to me, must be entitled to make some assumptions "respecting the person who deposits luggage with them: I think "they are entitled to assume that he can read, and that he "understands the English language, and that he pays such atten- "tion to what he is about as may be reasonably expected from a "person in such a transaction as that of depositing luggage in "a cloak-room. The railway company must, however, take man- "kind as they find them, and if what they do is sufficient to "inform people in general that the ticket contains conditions, I "think that a particular plaintiff ought not to be in a better "position than other persons on account of his exceptional "ignorance or stupidity or carelessness. But if what the railway "company do is not sufficient to convey to the minds of people "in general that the ticket contains conditions, then they have "received goods on deposit without obtaining the consent of the "persons depositing them to the conditions limiting their liability.

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[2] 2 C.P.D. 416, 422.

"I am of opinion, therefore, that the proper direction to leave to "the jury in these cases is, that if the person receiving the ticket "did not see or know that there was any writing on the ticket, "he is not bound by the conditions; that if he knew there was "writing, and knew or believed that the writing contained "conditions, then he is bound by the conditions; that if he knew "there was writing on the ticket, but did not know or believe "that the writing contained conditions, nevertheless he would "be bound, if the delivering of the ticket to him in such a manner "that he could see there was writing upon it, was, in the opinion "of the jury, reasonable notice that the writing contained "conditions." Mellish L.J. went on to say that the real question to which the attention of the jury ought to have been directed was whether the railway company did what was reasonably sufficient to give the plaintiff notice of the conditions.

In the judgment of Baggallay L.J. there appears this passage[3]: "The question then remains whether the plaintiffs "were respectively aware, or ought to be treated as aware, of "the intention of the company thus to modify the effect of the "ordinary contract. Now as regards each of the plaintiffs, if at "the time when he accepted the ticket, he, either by actual "examination of it, or by reason of previous experience, or from "any other cause, was aware of the terms or purport or effect "of the endorsed conditions, it can hardly be doubted that he "became bound by them. I think also that he would be equally "bound if he was aware or had good reason to believe that there "were upon the ticket statements intended to affect the relative "rights of himself and the company, but intentionally or negligently abstained from ascertaining whether there were any "such, or from making himself acquainted with their purport. "But I do not think that in the absence of any such knowledge "or information, or good reason for belief, he was under any "obligation to examine the ticket with the view of ascertaining "whether there were any such statements or conditions upon it."

I was told that there was no other authority which the industry and research of counsel engaged in the present case have been able to discover, which would assist me upon this point; and, therefore, I have to deal with the matter upon principle, and with the assistance of this authority which, it is quite true, is an authority relating to a contract where there was actually a ticket handed to one of the contracting parties; whereas the present case is not a case of contract, but of licence. No document was

[3] 2 C.P.D. 416, 425.

handed to the plaintiff, and everything depends upon the terms of this particular notice.

I think that the principle laid down by the Court of Appeal in *Parker* v. *South Eastern Railway Co.*[4] also applies to a case of licence. I hold, insofar as the plaintiff did actually read the terms of the notice, that she is clearly bound by those terms. Secondly, I hold that the fact that she left the rest unread, when she could have read it, does not avail her. I find that she was aware, or had good reason to believe, that there were on the notice board statements intended to affect the relative rights of herself and the first defendants as regards her user of the land. I hold that she is equally as bound as if she read them, if she intentionally or negligently refrained from ascertaining whether there were such statements, or from acquainting herself with their purport. I hold, therefore, that she was a licensee upon the terms of notice "A."

It follows, I think, from that, that if the first defendants were guilty of negligence, that notice is a defence. Another way, perhaps, of putting it is this, that she being bound by the terms of that notice, they were not under the duty that they would otherwise have been as a licensor to a licensee.

With regard to notice "B," as I have already said, I am not satisfied that she did actually see that notice. On the other hand, applying the principle of *Parker* v. *South Eastern Railway Co.*,[4] as I am satisfied that the notice was there and was plainly visible to anybody who kept his eyes open, I think the first defendants did what was reasonably sufficient to give the plaintiff notice of the terms contained in that notice. For that reason I hold that she was also bound by the terms contained in notice "B." It is not, I think, necessary for the purposes of this case for the first defendants to rely upon that. In my view, it is enough for them to rely upon the terms contained in notice "A." I hold, therefore, that as far as the first defendants are concerned, the plaintiff's case fails.

Assuming that I am wrong with regard to the question whether the plaintiff was a licensee on the terms of notice "A," I think I should decide whether or not, if the first defendants had been licensors without the benefit of those terms, they were guilty of negligence.

This is not a case where the injury to the plaintiff was caused by the static condition of the premises, but one where a licensee was injured by the conduct of the first defendants, as occupiers,

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[4] 2 C.P.D. 416.

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ASHDOWN v. SAMUEL WILLIAMS & SONS LTD.

Havers J.

in the course of doing things on their land—things which were alleged by the plaintiff to be negligent.

I think that everybody agrees that shunting is a dangerous operation, not only to those engaged in it, but also to persons who may be near the rail track on which the shunting is being done. It is still more dangerous if the line on which the shunting was taking place was on a curve, so that it would be blind, at any rate, on one side to the engine-driver, and to the shunter, who would be on one side of that curve. Without a look-out, or without giving some sort of warning, there would, in my view, be an obvious danger—whichever side the shunter was—to persons who were either crossing from the east or crossing from the west, because it was suggested that he may have been over on the other side—that is to say, on the west of the line—and if persons had been coming out of the second defendants' premises he would not have been able to see them.

[His Lordship referred to the evidence relating to the shunting operation, found negligence, and continued:] There could be no doubt, in such circumstances, that the accident and injury to the plaintiff were caused by such negligence. But for the reasons I have already given, I hold that the first defendants are protected by the terms of notice "A."

The second question which I have to consider is, again, a novel one, and one upon which counsel, again, were unable to provide me with any specific authority precisely covering the point. I have, therefore, to deal with it upon principle.

At first, I thought that it was a fairly simple matter to decide, but now—on consideration, and taking into account the arguments of Mr. Levy—I do not think that it is at all simple. There is no doubt about the general duty of an employer to his employees—which is to take reasonable care for the safety of his workmen, and so to conduct his operations as not to expose them to any unnecessary risk. This duty clearly subsists while a workman is in the course of his employment. Mr. Marven Everett cited to me a passage from *Priestley* v. *Fowler*,[5] where Lord Abinger[6] used the words "to provide for the safety of his "servant in the course of his employment." The difficulty is to know exactly what are the limits of "the course of the employ-"ment," especially in circumstances such as these. The duty clearly extends to matters arising while the workmen are coming to and leaving their place of work—at any rate, while they are on their employer's premises—and the duty continues while the

[5] (1837) 3 M. & W. 1.

[6] Ibid. 6.

workmen are working at the place of other persons, as was decided in *General Cleaning Contractors Ltd.* v. *Christmas.*[7] The duty is not confined to the actual performance of work, but also applies when the servant is doing something reasonably incidental to work, as where the plaintiff had gone to wash a tea cup when she slipped on an oily duckboard and injured herself: see the judgment of Lord Greene M.R. in *Davidson* v. *Handley Page Ltd.*[8]

Where the place of work abuts upon a public highway—and there are a variety of public highways from which the entrance to the place of work can be reached—then it seems to me clear that the duty of the employer towards his workmen does not begin until the workman has arrived at the entrance to the place of work. An employee is free to come by any route he knows and likes, and by any method of transport that he likes; and it seems to me to be clear that the employer would be under no duty with regard to those matters. A different position may arise if—as in the present case—the employer's place of work is entirely surrounded, for all practical purposes, by private land belonging to somebody else. The employer clearly has to provide some means of access to his employees by which they can reach their place of work. Indeed, in the present case, the second defendants had provided such a way, by obtaining the grant of the right of way along the long route, under the lease.

In such a case, where there is a right of way which the employee is entitled to use, it seems to me that if the employer intends his employees to use it, he would be under a general duty to take reasonable care that that way was reasonably safe for his employees to use. As regards the precautions which he could take, of course, regard would have to be had to the fact that he had a limited right only on the land, and that the land belonged to somebody else. I hold, in such circumstances, that there would be a duty upon the employer to take reasonable care to ensure that that way was reasonably safe for his employees.

A still more complicated position arises in the circumstances of this case, because not only was there this right of way which the employees could use if they were so minded, but there was the short route, and it was on that route on which the plaintiff sustained this accident. Therefore the further and more difficult question arises whether the second defendants are under any, and if so, what, duty to their employees who take the short route in the circumstances in which the plaintiff did.

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[7] [1953] A.C. 180; [1952] 2 All E.R. 1110.

[8] 61 T.L.R. 178; [1945] 1 All E.R. 235, 237.

The facts which one has to bear in mind in dealing with this question are that when the plaintiff was first engaged it was indicated to her that she could use this short route, if she pleased; and that she was taken over it by the second defendants' representative. She was well aware that there was the alternative route, the long route, which she could use, and she used either of those routes as she pleased. The representative, on the other hand, never told her—because he did not know—that the long route was one over which the company had a right of way demised by the lease.

In those circumstances, is there any duty upon the second defendants to take care for the safety of their employees when they were using the short route? And if so, what were the limits of that duty? In the absence of authority, I have to deal with the matter on principle.

I have come to the conclusion that there is a duty on the second defendants, as the employers, in such a case, to take reasonable care that the route which they have authorized their employees to use is reasonably safe to use. There may well be, in the circumstances, practical difficulties with regard to the precautions which the employer can take, but it seems to me that there are certain precautions which the reasonably prudent employer could take.

[His Lordship referred to the statement of claim and as to (a) held that the second defendants expressly assented to the use by the plaintiff of the short route, and knew of the danger. He continued:] The second head, (b), is that "they failed to provide "and enforce the use by their servants of a safe route to their "premises." I do not think that there was any duty on the employers to provide a safe route to these premises. The highest at which the duty could be put is that they failed to take reasonable care to provide a reasonably safe route. There can be no duty on the employers to enforce the use by their servants of the safe route. The highest obligation which would rest upon the employers would be to advise their servants to use a route which they pointed out. In fact the second defendants did not advise the plaintiff to use the long route. I have come to the conclusion that, in the circumstances, there was a duty upon the second defendants' representative—having pointed out to the plaintiff the shorter route as one which she was permitted to use—to warn her of the dangers of using that route. He did not do that, and in that respect there was a failure on the part of the second defendants to use reasonable care for the safety of their employees. Therefore, taking items (a) and (b) together, in the sense which I have indicated, I have come to the conclusion that the second defendants were negligent.

A point of some difficulty arises as to the question of causation. I agree it is impossible to say with certainty that if the defendants had carried out their duty the plaintiff might not still have used the short route. Not infrequently employers say that they cannot compel employees to adopt the safety precautions which they recommend. However, I have come to the conclusion that if the second defendants, having pointed out the short route as a route to the plaintiff, had warned her of its dangers, and had advised her to use the long route, she probably would not have used the short route; and this accident would not have happened in the way in which it did. In those circumstances, I find that the negligence of the second defendants was the cause of the plaintiff's accident and injuries.

[His Lordship then dealt with the allegations made by the defendants as to the plaintiff's own negligence and put her proportion of responsibility at one-fifth, and that of the second defendants at four-fifths. He then considered the injuries and the supervening disabilities and awarded £2,500 by way of general damages, of which the plaintiff was entitled to recover four-fifths. Special damages of £833 were also awarded.]

Judgment for the first defendants against the plaintiff.
Judgment for the plaintiff against the second defendants.

Solicitors: *Douglas Wiseman & Co., Barking; Gardiner & Co.; Blount, Petre & Co.*

E. M. W.

C. A.

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April 12, 13.

Jenkins and Hodson L.JJ. and Lloyd-Jacob J.

SOWERBY BRIDGE URBAN DISTRICT COUNCIL *v.* STOTT.

[No. L. 1404.]

Rates and Rating—Water rate—Discount—Whether discount of 10 *per cent. allowable—Whether section of Waterworks Clauses Act repugnant to later Acts—Sowerby Bridge Local Board Act,* 1863 (26 *Vict. c. lii*), *ss.* 6, 19—*Waterworks Clauses Act,* 1847 (10 *&* 11 *Vict. c.* 17), *s.* 72—*Rating and Valuation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 11 (1)—*Public Health Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *ss.* 129, 328.

County Court—Jurisdiction—Water rate—Jurisdiction transferred to Lands Tribunal—Water Act, 1945 (8 *&* 9 *Geo.* 6, *c.* 42), *s.* 38 (3) —*Local Government Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 26), *s.* 62 (1)—*Lands Tribunal Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 42), *s.* 1.

Lands Tribunal—Jurisdiction.

Statute—Repeal—Indirect repeal—Repugnancy.

Section 72 of the Waterworks Clauses Act, 1847, provides that the owners of properties of an annual value not exceeding £10 are to be charged for water supplies instead of the occupiers.

Section 72 was incorporated into a local Act by which the plaintiff council were authorized to supply water. The defendant was the owner of a number of properties situated within the district supplied by the council each of an annual value not exceeding £10. He was served with a demand note for the water rates in respect of those properties. He did not dispute that he was liable for the rate, but he contended that he was entitled to a discount of 10 per cent. of the charge on punctual payment by virtue of section 129 of the Public Health Act, 1936, and section 11 (1) of the Rating and Valuation Act, 1925, which, he submitted, had impliedly repealed section 72 of the earlier Act. The council had claimed the amount representing the discount in the county court, who had dismissed the action. On the council's appeal, the defendant submitted that the county court had no jurisdiction to deal with the claim because, by the joint effect of section 62 (1) of the Local Government Act, 1948, and section 1 (3) (*e*) of the Lands Tribunal Act, 1949, all disputes concerning water rates were to be referred to and determined by the Lands Tribunal:—

Held, (1) that there was no repugnancy between section 72 of the Waterworks Clauses Act, 1847, and section 129 of the Public Health Act, 1936, and, therefore, the enactment of section 129 of the Act of 1936 did not necessarily have the effect of repealing section 72 as incorporated into the local Act. Both sections could exist together. The duty and power conferred on the council by section 72 to charge the appropriate rates on the owners of houses within the stated financial limits were preserved and saved by section 328 of the Public Health Act, 1936; accordingly, the rates in question were to be claimed from the owner of the properties and were not subject to any discount.

(2) That the transfer of jurisdiction conferred by section 38 (3) of the Water Act, 1945, to the county court by section 62 (1) of the Local Government Act, 1948, and thence to the Lands Tribunal by section 1 (3) (*e*) of the Lands Tribunal Act, 1949, was limited to jurisdiction in those cases where the water undertakers had elected to proceed by cutting off supplies of water instead of taking the defaulter immediately to court. The dispute in question was within the jurisdiction of the county court.

APPEAL from Judge Archibald sitting at Halifax County Court.

The defendant, Raymond Stott, was the owner of 56 dwelling-houses situated in Albert Road, Union Street and Claremont Street, Sowerby Bridge in the West Riding of Yorkshire and all in the district affected by the provisions of the Sowerby Bridge Local Board Act, 1863, and all of a rateable value below £10.

On July 4, 1955, the Sowerby Bridge Urban District Council, as water undertakers in that district, sent to the defendant a demand note in respect of the charges for water supplied by the council to the said properties. The total charges for the first half year were £43 1s. (and included arrears of 14s. 11d.). Discount for punctual payment was allowed on the amount due, excluding the arrears, at the rate of five per cent. The total water charges for the second half year were £41 9s. 11d. (including the arrears of 14s. 11d. which the defendant had not paid on the previous occasion). Discount from the sum due (that is £40 15s.), excluding the arrears, was again allowed at the rate of five per cent. for payment on and before November 4, 1955. On September 28 the defendant wrote to the council enclosing a cheque for £35 6s. 2d. and claiming that, in accordance with the provisions of section 129 of the Public Health Act, 1936,[1] he was entitled to a discount of 10 per cent. for prompt payment of the water charges and that his payment had been calculated on that basis. The council contested his right to this discount and eventually brought proceedings in the county court to recover the balance which they claimed remained owing to them, that is, £6 3s. 9d. The county court judge dismissed the action and the council appealed. On appeal the defendant submitted that the county court had had no jurisdiction to deal with the claim since by the joint effect of section 62 (1) of the Local Government Act, 1948,[2] and section 1 (3) (*e*) of the Lands Tribunal Act, 1949,[3] jurisdiction to hear and to determine all disputes concerning water rates had been transferred to the Lands Tribunal.

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[1] Public Health Act, 1936, s. 129: "(1) Where a local authority supply "water under this Act to a house, or "to a part of a house occupied as a "separate tenement, and the owner "thereof is, under subsection (1) of "section 11 of the Rating and Valua-"tion Act, 1925, as amended by any "subsequent enactment, rated instead "of the occupier, the owner instead "of the occupier shall, if the authority "so determine, pay the rate for the "supply of water, but nevertheless "the rate may be demanded and "recovered by them from the occupier "and, if it is so recovered, the occu-"pier shall, unless as between him-"self and the owner he is liable to "pay the rate, be entitled to deduct "the amount so paid from his rent. ". . . (2) An owner of premises to "which a determination of the local "authority under this section applies "shall, if he pays the amount due by "him in respect of a water rate before "the expiration of one-half of the "period in respect of which the rate is "payable, or before such later date "as may be specified by the authority, "be entitled to an allowance calcu-"lated at the same rate per cent. as "the allowance which is made to him

C. E. Scholefield for the council. There are two preconditions to the application of section 129 of the Public Health Act, 1936. First, the supply of water must be under that Act and, secondly, the authority must have determined to rate the owner instead of the occupier. Neither of those conditions is satisfied in the present case. The water was supplied under the Sowerby Bridge Local Board Act, 1863, and no determination had been made. A mere demand for rates from an owner does not amount to a determination for this purpose. There must be a specific resolution by the council that owners instead of occupiers should be rated.

The defendant said that the council were estopped from denying that they were supplying water under the Public Health Act, 1936, because they had said so in certain advertisements published in the Halifax Courier. The council may well have

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"in respect of a general rate under "paragraph (*a*) of subsection (1) of "section 11 of the Rating and Valuation Act, 1925, as amended by any "subsequent enactment."

S. 328: "All powers and duties "conferred or imposed by this Act "shall be deemed to be in addition to, "and not in derogation of, any other "powers and duties conferred or "imposed by Act of Parliament, law "or custom, and, subject to any "repeal effected by, or other express "provision of, this Act, all such other "powers and duties may be exercised "and shall be performed in the same "manner as if this Act had not been "passed."

[2] Local Government Act, 1948, s. 62: "(1) So much of any statutory "provision as authorizes or requires "any dispute arising in relation to "water rates to be determined by a "court of summary jurisdiction shall "have effect as if it authorized or "required that dispute to be determined by the county court for the "county court district in which the "property in question is situated."

[3] Lands Tribunal Act, 1949, s. 1: "(3) There shall be referred to and "determined by the Lands Tribunal— ". . . (*e*) any question on which, but "for this provision, an appeal or "reference to the county court would "or might be made by virtue of "section 49, 62 or 87 of the Local "Government Act, 1948."

thought that the water supply in question was made under that Act, but the mere fact that they have made a mistake in an entirely different context, and a mistake which has not caused the defendant to alter his position to his detriment in any way, cannot possibly estop them from maintaining that the supply was under a different Act. The council do in fact supply water in certain areas under the Act of 1936, but not to these properties. There is no reason why the supply should not be made partly under one Act and partly under another even in the same area. The local Act under which the supply was made incorporates section 72 of the Waterworks Clauses Act, 1847, by which owners of properties of an annual value of under £10 are to be rated instead of the occupiers. That section does not provide for the payment of a discount for prompt payment.

Section 20 of the local Act of 1863 requires that water rates should be assessed according to the provisions of the Public Health Acts relating to the supply of water, but the "Public "Health Acts" does not there mean the Acts for the time being. The phrase is defined by section 3 as including the Public Health Act, 1848, and the several Acts passed prior to 1858 amending it. The defendant submitted that the Act of 1936 had abrogated the local Act, but there is no prima facie reason why a general Act should abrogate a local one. Generalia specialibus non derogant: *Corporation of Blackpool* v. *Starr Estate Co. Ltd.*[4] The Act of 1936 was a consolidating statute but it did not purport to repeal the local Act. Further, section 328 of the Act of 1936 expressly maintains existing powers and recognizes that the powers conferred by the Act are in addition to, and not in derogation of, existing powers. The view that section 72 of the Act of 1847 remains in force is strengthened by section 38 (2) of the Water Act, 1945,[5] which recognizes the existence of provisions relating

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[4] [1922] 1 A.C. 27; 38 T.L.R. 79.

[5] Water Act, 1945, s. 38: "(1) "Water rates payable to statutory "water undertakers, whether under "the Public Health Act, 1936, or "under any other enactment, shall be "payable and recoverable in accord"ance with the provisions of this sec"tion and not otherwise. (2) Except "where an owner of premises who is "not himself the occupier thereof is "liable by or under any enactment, "or by agreement with the under"takers, to pay the water rate for a "supply of water to those premises, "the water rate shall be payable by "the occupier of the premises. (3) "The water rate payable by any per"son may after a demand therefor be "recovered from him by the under"takers either summarily as a civil "debt, or as a simple contract debt in "any court of competent jurisdiction, "and, subject as hereinafter provided "and to the provisions of the next "following subsection, where a person "fails to pay within seven days after "a demand therefor any instalment

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to the supply of water other than those contained in the Act of 1936—thus showing that that sort of provision could still be in existence in 1945.

The defendant has submitted that the county court had no jurisdiction to determine this question and that the proper tribunal was the Lands Tribunal. That submission is founded on section 38 (3) of the Water Act, 1945, section 62 (1) of the Local Government Act, 1948, which substituted the county courts for the courts of summary jurisdiction, and section 1 (3) (*e*) of the Lands Tribunal Act, 1949, which transferred certain matters determinable by the county court to the Lands Tribunal. The transfer effected by the Acts of 1948 and 1949 was, however, limited to disputes of the type mentioned in the proviso to section 38 (3) of the Water Act, 1945, and in all other respects the jurisdiction was unaffected. The county court has therefore jurisdiction to determine questions involving disputes as to the amount of rates payable except where the undertakers seek to proceed by way of cutting off the supplies instead of taking the defaulter to court.

F. A. Stockdale for the defendant. The provision in section 38 (3) of the Water Act, 1945, that where notice has been given that the amount of the water rate claimed or the liability to pay it is disputed the undertakers shall not cut off the supply until the dispute has been settled by a court of summary jurisdiction is mandatory. Section 62 (1) of the Local Government Act, 1948, refers to provisions which " authorize " the reference of disputes to the courts of summary jurisdiction as well as to those which " require " disputes to be referred there. If section 62 applied only to the proviso to section 38 (3) of the Act of 1945, the reference to permissive provisions would be otiose, for section 62 does not, apparently, refer to any section other than section 38 of the Act of 1945.

The effect of section 62 of the Act of 1948 was to make the county court the sole tribunal to which collectors of water rates could resort if their claims were disputed, and the Act of 1949 transferred the whole matter to the Lands Tribunal. [Reference

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" of a water rate payable by him in " respect of any premises, the under- " takers may cut off the supply of " water to the premises and recover " the expenses reasonably incurred " by them in so doing in the same " manner as the instalment due: Pro- " vided that if, before the expiration " of the said seven days, notice in " writing is given to them that there " is a dispute as to the amount due " in respect of the water rate, or as " to the liability to pay the rate, they " shall not cut off the supply of water " until the dispute has, on the applica- " tion of either party, been settled by " a court of summary jurisdiction . . ."

was made to Michael & Will on the Law relating to Water, 9th ed. (1950), p. 111.]

[JENKINS L.J. Proceedings for recovery do not necessarily postulate the existence of a dispute. It might not be possible to know until a matter comes before the court whether there is in fact any dispute, and it would be most inconvenient if the matter had then to be referred to the Lands Tribunal.]

It is not suggested that the Public Health Act, 1936, expressly repealed the local Act, but it may have done so impliedly. The two Acts may have merged so that they should be read together. If section 20 of the Act of 1863 stood alone there would clearly have been a merger with the Act of 1936, but it is said on behalf of the council that that is prevented by the definition of Public Health Acts in section 3 of the Act of 1863. That definition is not, however, and does not purport to be, exhaustive. In construing section 20 of the Act of 1863 so far as rates and charges are concerned, one should look at the Public Health Acts which are in force at the date when the problem is being considered, so that subject only to the requirement of a determination, section 129 of the Act of 1936 is applicable in the present case. There is no positive evidence that there was a determination in the sense suggested on behalf of the council, but the owners have been charged with the rates and a demand note cannot come into existence without a determination of some kind having been made. Further, the statement in the advertisements that the supply was made under the Act of 1936, coupled with the fact that the council allowed a discount of 10 per cent. in previous years, suggests strongly that they were in fact supplying water under the Act of 1936. The discount must have been allowed under section 129, either correctly or mistakenly, for there is no power to grant a discount under any other section.

It is said that section 38 (2) of the Water Act, 1945, seems to recognize that provisions of the type contained in section 72 of the Act of 1847 might still be in force in 1945. There may, of course, be local Acts in which the definition of "Public Health "Acts" is narrower than that contained in section 3 of the Act of 1863, and in those cases the earlier provisions may still subsist, but the local Act here in question has merged with the Act of 1936.

If the Act of 1936 is, however, to be regarded as being complementary to the local Act so that the council had the choice as to which was the most suitable power to exercise, it would

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be essentially a question for the county court judge to determine under which set of powers the authority was in fact operating.

Scholefield replied.

JENKINS L.J. This is an appeal by the Sowerby Bridge Urban District Council from a judgment of Judge Archibald given in the Halifax County Court on February 24, 1956, whereby he dismissed an action brought by the council against the defendant, Mr. Raymond Stott, to recover from him the sum of £6 3s. 9d. for water charges allegedly owing in respect of a number of houses owned by him in the district.

Apart from a submission made by Mr. Stockdale for the defendant to the effect that the county court judge had no jurisdiction in the matter (with which I will deal later in this judgment), the sole question in the case is whether the defendant is entitled to be allowed for punctual payment a discount of 10 per cent. on the amount of the water rate payable by him for the year 1955–1956 in respect of the houses in question, and the disputed sum of £6 3s. 9d. may be regarded as representing the balance owing by the defendant on the footing that the 10 per cent. discount was not allowable. The council, by what authority we were not informed, appear in fact to have allowed or been prepared to allow, a discount of five per cent. only.

The defendant claims to be entitled to the 10 per cent. discount by virtue of section 129 of the Public Health Act, 1936. [His Lordship read the section and continued:] To make those provisions intelligible it is necessary also to refer to the material parts of section 11 of the Rating and Valuation Act of 1925. Section 11 of that Act provides, so far as material, as follows by subsection (1): "The rating authority may by resolution direct "that, in the case of all hereditaments in their area (exclusive of "hereditaments consisting of agricultural land) which belong to "a class to be defined in the resolution by reference to rateable "value and also, if rent is paid, by reference to the interval at "which rent from time to time becomes payable or is collected, "the owners thereof shall be rated instead of the occupiers." Then, passing over a proviso with which I need not trouble, section 11 (1) continues: "Where a rating authority give any such direc-"tion as aforesaid—(*a*) the owners of any hereditaments in the "area of that authority to which the direction applies shall, in the "case of any rate made while the resolution is in force, be rated "accordingly, and the rating authority shall make to any owner "who being so rated pays the amount due by him in respect of

" the rate before the expiration of one-half of the period in respect " of which the rate is made (or, if the rate is payable by instal- " ments, one-half of the period in respect of which the instalment " is payable) or such later date or dates as may be specified in " the resolution an allowance equal to ten per cent. of the amount " payable." I understand that a direction under that provision had in fact been given in terms which included the defendant's houses.

The water charges to which the dispute relates were undoubtedly claimed by the council from the defendant as owner of the houses in question and not from the occupiers.

The defendant contends that this can only have been done by virtue of a determination by the council under section 129 of the Act of 1936, and that he is, accordingly, entitled to the discount claimed by virtue of subsection (2) of that section, read in conjunction with section 11 (1) of the Act of 1925.

The council contend that section 129 of the Act of 1936 has no application, because the water was supplied not under that Act, but under their own local Act of 1863 (to which I am about to refer) and, further, that even if section 129 did apply, there was no determination by the council under that section.

If the council had in truth no warrant for claiming the water rate from the defendant other than section 129, and if that section was indeed applicable to the case, I would be reluctant to deprive the defendant of his discount on the ground that the council had never formally determined to apply the section to the defendant's houses, seeing that they had in fact charged him with the water rate which, on this hypothesis, they could not lawfully have done otherwise than in pursuance of such a determination. It is, however, difficult to resist the conclusion that there was no such determination, in view of the evidence of Mr. Womersley, clerk to the council, to the effect that there was none.

I do not, however, find it necessary to decide what the result might have been if the matter had depended on section 129 alone, and the council, being entitled so to do, had purported to apply that section but without any formal determination to that effect.

The council are water undertakers in their district, not merely in their capacity as a local authority but by virtue of their special powers and duties under a local Act, namely, the Sowerby Bridge Local Board Act, 1863. By section 3 of that Act a number of expressions are defined, and (inter alia) the expression " the district " is defined as meaning " the present district of

" the local board, and shall in addition thereto include "—some additional areas of land into the details of which I need not enter. Then there is this definition of " the Public Health " Acts ": " The expression ' the Public Health Acts ' includes " ' the Public Health Act, 1848,' and the several Acts passed " prior to the year 1858 amending the same, and ' The Local " ' Government Act, 1858,' and the several Acts subsequently " passed amending the same." Section 6 effects incorporation in the local Act of a number of other statutory provisions. Its materiality for the present purpose is that it incorporates section 72 of the Waterworks Clauses Act, 1847, the form of the section being to incorporate the Acts referred to with certain specified exceptions which do not include section 72 of the Act of 1847. By section 19: " The local board shall, at the request of the " owner or occupier of any house, or part of a house, in any " street within the district in which any pipe of the local board " shall be laid, or of any person who, under the provisions of " this Act, shall be entitled to demand a supply of water for " domestic purposes within the district, furnish to such owner " or occupier or other person a sufficient supply of water for " their domestic purposes at rates as hereinafter provided; provided that the local board shall not be bound to afford such " supply if and when by reason of any default of the corporation " of Halifax they shall be unable to do so." That, say the council, is the enactment under which they are charged with the duty of supplying water. Section 20 provides: " The rates " and charges to be made by the local board for the supply of " water under this Act shall in all respects be made, assessed, " and levied according to the provisions of the Public Health " Acts relating to the supply of water."

I should next refer to section 72 of the Act of 1847. That section provides: " The owners of all dwelling-houses or parts " of dwelling-houses occupied as separate tenements, the annual " value of which houses or tenements shall not exceed the " sum of ten pounds, shall be liable to the payment of the " rates instead of the occupiers thereof; and the powers and " provisions herein or in the special Act contained for the " recovery of rates from occupiers shall be construed to apply to " the owners of such houses and tenements; and the person " receiving the rents of any such house or tenement as aforesaid " from the occupier thereof, on his own account, or as agent or " receiver for any person interested therein, shall be deemed the " owner of such house or tenement." The rate referred to in that section is, of course, the water rate, the Act being the Waterworks Clauses Act, 1847. All the houses here in question are within the limits of the annual value prescribed by that section.

The council claim that the water rate now in question was charged against the defendant as owner of the houses under section 72 of the Act of 1847, as incorporated in their local Act; and under that section no determination is necessary in order to charge the owner and no discount for punctual payment is authorized or enjoined. I see no answer to this unless section 72 can be held to have been repealed. I cannot find that it has.

The council contend that the Public Health Acts referred to in the local Act are limited to those specifically mentioned in section 3 of the local Act. The defendant contends that the reference includes all Public Health Acts for the time being in force, whether passed before or after the local Act. I see no necessity to decide this point. The defendant contends that if he is right upon it, the result is that section 72 of the Act of 1847 has been superseded, modified or by implication repealed by section 129 of the Public Health Act, 1936. I cannot agree. The two sections are different in their scope and effect. Section 72 is limited to houses not exceeding the annual value specified in the section itself. So far as houses falling within that limit are concerned, section 72 enjoins that the owners shall be chargeable. Section 129 of the Act of 1936 itself imposes no limits of value, but leaves it to the local authority to determine to what houses its provisions shall be applicable, provided that the case is brought within section 129 by the referentially incorporated provisions of section 11 (1) of the Rating and Valuation Act, 1925. The two sections are different in scope and effect and, to my mind, they can well stand together. There is no repugnancy between them and no ground for saying that the enactment of section 129 had the effect of repealing section 72 of the 1847 Act, as incorporated in the local Act.

Mr. Scholefield, for the council, relied on the maxim generalia specialibus non derogant, and he referred us to *Corporation of Blackpool* v. *Starr Estate Co. Ltd.*[1] To my mind, there is great force in Mr. Scholefield's submission that, applying that principle, it is wrong to hold that the effect of section 20 of the local Act, which provides that the rates and charges under the local Act "shall in all respects be made, assessed, and levied according to "the provisions of the Public Health Acts relating to the supply "of water," and of section 129 of the Act of 1936, on the footing that the Public Health Acts referred to in the local Act are Acts passed and to be passed, whether before or after that Act, general as these enactments are, should be to repeal by implication the particular provisions of section 72 of the Act of 1847 as incorporated in the local Act. There is, as I have said, to my mind, great force in that contention. But I need express no concluded view upon it because, as I have said, I see no reason why section 129 and section 72 as incorporated in the local Act should not exist together.

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[1] [1922] 1 A.C. 27; 38 T.L.R. 79.

But the matter does not rest there. I would call attention to section 328 of the Public Health Act, 1936, which is a saving provision. [His Lordship read section 328 and continued:] Section 72, as it seems to me, conferred on the council a power and imposed on them a duty to charge the appropriate rates to the owners of houses falling within section 72, and it seems to me that section 328, which is in most general terms, is apt to include such power and duty in the saving which it effects.

I would also refer to section 38 of the Water Act, 1945. The first two subsections of that section are in these terms: "(1) Water rates payable to statutory water undertakers, whether "under the Public Health Act, 1936, or under any other enact-"ment, shall be payable and recoverable in accordance with the "provisions of this section and not otherwise. (2) Except where "an owner of premises who is not himself the occupier thereof "is liable by or under any enactment, or by agreement with the "undertakers, to pay the water rate for a supply of water to those "premises, the water rate shall be payable by the occupier of the "premises." It seems to me that subsection (2) of the section embodies a clear recognition of the existence in some of the enactments in force relating to the supply of water—and, I apprehend, enactments whether general or special—provisions of the type of section 72. That reinforces my conclusion that the Act of 1936 effected no repeal of section 72, which was recognized as a provision of a type which could still be on foot at the time when the Water Act, 1945, was passed.

For these reasons, I am of opinion that the rates claimed against the defendant in this case were claimable and must be regarded as having been claimed by virtue of section 72 as incorporated in the local Act, and, being referable to that enactment, they were not the subject of the 10 per cent. discount. Local authorities, I apprehend, have no power to make a gift to a ratepayer of a discount which they have no authority to make, and, in my view, the council, on the true construction of the relevant enactments, have no authority to allow the discount in this case. It was not a matter of determining that owners rather than occupiers should pay the rates under section 129 of the Act of 1936. It was a case in which section 72 of the local Act enjoined that the owner should pay.

Some reliance was placed on the defendant's side on certain advertisements, and to the form of the demand note used by the council. It seems reasonably clear that when the notices or advertisements in question were issued, the council were under the impression that the section under which they should proceed to recover rates from the owner in cases such as that of the defendant was in section 129 of the Act of 1936. I would add that it would seem that in respect of the year 1954–1955 a 10 per cent. discount was in fact allowed. But these matters, if I am right in my view of the effect of the legislation to which I have referred, merely indicate that the council misapprehended the legal position, and could not make section 129 of the Act of 1936 applicable to the case if, on the true view of the law, it was inapplicable. The council had no option but to act in accordance with law, and section 72 enjoined them to charge the defendant, who, under that section, was liable to pay without any discount.

I now turn to the question of jurisdiction. Mr. Stockdale invites us to hold that the county court had no jurisdiction to entertain these proceedings, and that the proper forum was, curious as it might seem, the Lands Tribunal constituted under the Lands Tribunal Act, 1949. The argument begins with section 38 of the Water Act, 1945. The reference this time is to subsection (3) of that section, which provides: "The water rate "payable by any person may after a demand therefor be recovered "from him by the undertakers either summarily as a civil debt, "or as a simple contract debt in any court of competent jurisdic-"tion, and, subject as hereinafter provided and to the provisions "of the next following subsection, where a person fails to pay "within seven days after a demand therefor any instalment of "a water rate payable by him in respect of any premises, the "undertakers may cut off the supply of water to the premises and "recover the expenses reasonably incurred by them in so doing "in the same manner as the instalment due: Provided that if, "before the expiration of the said seven days, notice in writing "is given to them that there is a dispute as to the amount due "in respect of the water rate, or as to the liability to pay the "rate, they shall not cut off the supply of water until the dispute "has, on the application of either party, been settled by a court

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"of summary jurisdiction." Mr. Stockdale says, in effect, that this section provides for the recovery of rates in plain cases of default either summarily—that means, before the justices as a civil debt—or as a simple contract debt in any court of competent jurisdiction, which would, generally speaking, mean the county court. In addition to that, it provides for the recovery of the rates by those means in cases where liability may be disputed. It further makes provision for the settlement of disputes in cases where the undertakers seek to avail themselves of the power of cutting off the supply of water. Where that method of collection or of enforcing payment is resorted to, the proviso applies, so that, if before the expiration of the said seven days "notice in writing "is given to"—the undertakers—"that there is a dispute as "to the amount due in respect of the water rate, or as to the "liability to pay the rate, they shall not cut off the supply of "water until the dispute has, on the application of either party, "been settled by a court of summary jurisdiction." All these, says Mr. Stockdale, are ways of recovering the rates and settling disputes in regard to the liability for them or the proper amount of them.

The matter standing thus, there came into operation the Local Government Act, 1948, and the relevant section of it is section 62 (1), which provides: "So much of any statutory "provision as authorizes or requires any dispute arising in relation "to water rates to be determined by a court of summary juris- "diction shall have effect as if it authorized or required that "dispute to be determined by the county court for the county "court district in which the property in question is situated." Now Mr. Stockdale, as regards that provision, claims that the effect of it is that all disputes of any of the kinds he finds dealt with in section 38 (3) of the Water Act, 1945, shall be determined by the county court. That would mean that wherever there was a dispute as to amount or as to liability, section 62 (1) of the Act of 1948 had the effect of ousting the jurisdiction of the justices, and making the sole competent tribunal the county court.

Finally, comes the Lands Tribunal Act, 1949. That Act provides, by section 1 (1), that there shall be set up certain tribunals, the tribunal set up in respect of the United Kingdom, other than Scotland, being called "the Lands Tribunal." By subsection (3) of section 1, it is provided that "There shall be "referred to and determined by the Lands Tribunal—. . . (*e*) any "question on which, but for this provision, an appeal or "reference to the county court would or might be made by virtue "of sections 49, 62 or 87 of the Local Government Act, 1948." It follows, according to Mr. Stockdale's argument, that, the county court having become the sole repository of jurisdiction by virtue of section 62 (1) of the Act of 1948, the whole of that jurisdiction was transferred to the Lands Tribunal. The argument would produce a curious result, for it would, as I understand it, involve the consequence that all proceedings for the recovery of water rates in which any dispute arose as to amount or liability would have to be dealt with by the Lands Tribunal, and it seems to me that that would be, to say the least, an inconvenient arrangement.

Mr. Stockdale conceded, as I understand it, that in cases of plain default, for instance, the case of a person liable for the rate having disappeared from the district, or deliberately absenting himself from the court, or not paying simply because he was without means—that in a case of that sort, where the liability was undoubted, the jurisdiction might still remain with the court of summary jurisdiction or with the county court. He did, I think, say that in these undisputed cases the county court or the court of summary jurisdiction might still be the proper tribunal. But as soon as a dispute as to amount or liability arose, then, in his submission, the county court would, under section 62 of the Act of 1948, have been the only competent tribunal, and, since the Lands Tribunal Act, 1949, was passed, the Lands Tribunal would be the only competent tribunal. That would, as it seems to me, be productive of great inconvenience, because it might not appear whether there was any dispute until the proceedings had been launched, and, if a dispute did emerge in the course of proceedings launched before the justices or in the county court, the matter would, in mid-hearing, pass into the exclusive jurisdiction of the Lands Tribunal.

Mr. Stockdale founded himself to some extent on the words "authorizes or requires" in section 62 (1). He said that those words could not be satisfied unless the effect of section 62 was as he submitted it to be. I cannot agree with that submission. It must be remembered that section 62 refers to "so much of *any* "statutory provision as authorizes or requires any dispute," and so forth. So the appropriateness of the words "authorizes or "requires" cannot be judged by reference solely to the particular provisions with which we are here concerned.

The opposing view, which seems to me to be preferable and which I adopt, is that the effect of section 62 of the Act of 1948 was to leave the jurisdiction under section 38 (3) of the Act of 1945 as it was in all respects except in regard to the cases of dispute dealt with in the proviso to subsection (3). On that view, the reference to any dispute in section 62 (1) of the Act of 1948 must be construed as referring to a dispute such as is mentioned in the proviso. So that the change in jurisdiction is limited to those cases in which the undertakers elect to proceed by way of cutting off the water instead of taking the defaulter immediately to court. In such cases seven days' notice must be given, and if notice is given to the undertakers that there is a dispute as to the amount due, or as to the liability, then they are not to cut off the supply of water until the dispute has, as the matter originally stood under subsection (3) of section 38, on the application of either party been settled by a court of summary jurisdiction. Those are the disputes, as it seems to me, to which section 62 (1) refers, and that is borne out by the use of the very same word " dispute " in section 62 (1). It seems to me to point to the disputes referred to, and to only those referred to, in the proviso to section 38 (3). The effect of section 62 of the Act of 1948, thus, in my judgment, was to make the county court instead of a court of summary jurisdiction the proper tribunal to deal with disputes notified under the proviso to section 38 (3).

The position was changed by section 1 (3) (*e*) of the Lands Tribunal Act, in my judgment, only to the extent that the Lands Tribunal was substituted for a county court as the tribunal to deal with disputes of the same kind, that is to say, disputes which might be notified under the proviso to section 38 (3), and thus become the subject of a reference to the county court under that proviso as amended.

The point is a short one, which I fear I have dealt with at somewhat undue length. But, placing the best construction I can on the relevant provisions, I find no sufficient ground for holding that the county court did not have jurisdiction in this case.

In conclusion, I should refer to the brief note of the judge's judgment. He said: " Claim dismissed on the ground that water " was supplied under the Act of 1936 as it is a more recent Act, " is a consolidating statute and must be ' executed ' by all local " authorities. Section 1 (2) of the Public Health Act, 1936, " defines ' local authority ' as the council of a borough urban " district or rural district. Plaintiff council is an urban district " council. Although one can understand why, in certain cases,

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"it may be desirable to retain the old and original Act, I "cannot see why it should be so in this case." With respect to the judge, it seems to me that he did not give due weight to section 328 of the Act of 1936, and did not sufficiently apply himself to the question whether, on the assumption that the reference in section 20 of the local Act to the Public Health Acts included all Acts passed and to be passed, nevertheless the provisions of section 72 of the Act of 1847 as incorporated in the local Act were capable of co-existence with the provisions of section 129 of the Act of 1936, and, therefore, should not be regarded as entirely repealed by them. For these reasons I would allow this appeal.

Finally, I would observe that as there was some discussion as to the propriety of this rate on other grounds, nothing said in this judgment is to be treated as deciding by implication or otherwise any other question that anyone may hereafter seek to raise as to the propriety of the rate. Our decision simply is to the effect that the 10 per cent. discount claimed by the defendant was not properly allowable in this case.

Hodson L.J. I agree, and I cannot usefully add anything.

Lloyd-Jacob J. I also agree.

Appeal allowed. Order discharged.
Judgment entered for plaintiffs for £6 3s. 9d.

Solicitors: *Jaques & Co. for Godfrey Rhodes & Evans, Halifax; David Garsed & Sons, Elland, near Halifax.*

E. D.

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April 16, 17, 18, 27.

Lord Evershed M.R., Jenkins and Hodson L.JJ.

REGIS PROPERTY CO. LTD. *v.* REDMAN AND ANOTHER.

[Plaint No. LP 193.]

Landlord and Tenant — Rent restriction — Standard rent — Increase — Series of lettings—Transfer to landlord of burden previously borne by tenant—Whether after transfer of burden from tenant to landlord further increases permissible on grant of subsequent tenancies on ground of increased costs—"Previously borne by the tenant"—"Previous terms"—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 2 (1) (*b*) (3).

Landlord and Tenant—Covenant—Central heating installation—Block of flats — Covenant by landlord to supply hot water and central heating—Whether right or privilege known to law—Lease—Conveyance of land—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 62.

The landlords, owners of a block of flats built in 1936, first let one of the flats under a tenancy agreement dated April 8, 1936, for the term of three years from March 25, 1936, at a yearly rent of £115. That rent became the standard rent under the Rent and Mortgage Interest (Restrictions) Act, 1939. This letting was inclusive of general and water rates which the landlords covenanted to pay. The flat was added to the current valuation list by amendment (the list having been settled shortly before the building of the flats) at the rateable value of £41 and stood in the list at this figure down to March, 1941, when by an amendment of the list operating retrospectively as from April 1, 1935, its rateable value was reduced to £34, the retrospective operation of the amendment being attributable to section 37 (10) of the Rating and Valuation Act, 1925. The tenant under this agreement held over at the end of the three years, and was still in occupation of the flat on the same terms on September 1, 1939.

The flat was subsequently let to C. in November, 1943, to N. in June, 1949, and finally, to the present tenants on a monthly tenancy under a tenancy agreement dated February 12, 1953. By that agreement, inter alia, the tenants covenanted, to pay the general rates in respect of the flat; and "to keep the interior of "the flat together with all fixtures and fittings . . . in good and "substantial repair . . . (fair wear and tear . . . excepted) and so to "deliver up at the end of or sooner determination of the tenancy ". . . ," and the landlords covenanted to use their "best endeavours "throughout the term to maintain at all times a reasonable and "adequate supply of hot water for domestic purposes to the flat "through the central installation (if any such heating installation "is installed in the building) and to keep the radiators (if any) in "the flat sufficiently and adequately heated through the central "heating installation (if any such heating installation is installed "in the building). Provided that the [landlords] shall not be "liable to supply hot water for the central heating installation "(if any) except during the cold season between dates to be determined at the [landlords'] discretion and Provided also that the "[landlords] shall not be liable in damages in the event of any "interruption of such services."

By a notice dated February 20, 1947, the liability for general rates in respect of the flat was transferred to the tenant. In 1946 there was an increase of general rates, in respect of which a notice of increase was served on April 20, 1946. By the letting to C. in November, 1943, the landlords first undertook the liability of supplying hot water and central heating to the flat. Under the tenancy agreement with N. in June, 1949, for the covenant by the tenant as to repairs contained in the agreements of April 8, 1936, and November 26, 1943, there was substituted a covenant by the tenant limited to the repair of the interior of the flat with an exception of fair wear and tear, in identical terms with the corresponding covenant by the present tenants in their tenancy agreement dated February 12, 1953.

The landlords now claimed against the present tenants a declaration that they were entitled to an increase of rent in the form of payments in respect of the transfers of burdens or liabilities within section 2 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920,[1] on the footing that those transfers took place on the letting to the present tenants in February 1953, and that, accordingly, the recoverable rent was in the region of £140:—

Held, (1) that by virtue of section 2 (1) (*b*) and (3) of the Act of 1920, on the transfer in February, 1947, of the liability for general rates, the appropriate amount whereby the rent had to be reduced was an amount corresponding to the rates payable

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[1] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2: "(1) The amount by which the increased rent of a dwelling-house "to which this Act applies may exceed the standard rent shall, subject to the provisions of this Act, "be as follows, that is to say:— "(*b*) An amount not exceeding any "increase in the amount for the "time being payable by the landlord "in respect of rates over the corresponding amount paid in respect of "the yearly, half-yearly or other "period which included [September "1, 1939] or in the case of a dwelling-house for which no rates were payable in respect of any period which "included the said date, the period "which included the date on which "the rates first became payable thereafter. . . ." (3) Any transfer to a "tenant of any burden or liability "previously borne by the landlord "shall, for the purposes of this Act, "be treated as an alteration of rent, "and where, as the result of such a "transfer, the terms on which a "dwelling-house is held are on the "whole less favourable to the tenant "than the previous terms, the rent "shall be deemed to be increased, "whether or not the sum periodically "payable by way of rent is increased, "and any increase of rent in respect "of any transfer to a landlord of any "burden or liability previously borne "by the tenant where, as the result "of such transfer, the terms on which "any dwelling-house is held are on "the whole not less favourable to the "tenant than the previous terms, "shall be deemed not to be an increase of rent for the purposes of "this Act: Provided that, for the "purposes of this section, the rent "shall not be deemed to be increased "where the liability for rates is "transferred from the landlord to the "tenant, if a corresponding reduction "is made in the rent."

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in respect of the premises at the date of the transfer, and that the amount by which in the meantime the rent could be lawfully increased corresponded to the increase in the rates over the sum paid for rates on September 1, 1939, on the basis of the amended valuation of £34.

(2) That the right to receive a supply of hot water and central heating could not be treated as having passed by virtue of section 62 of the Law of Property Act, 1925,[2] since it was not a right or privilege of the kind contemplated by that section.

(3) That the burden of supplying hot water and central heating must be regarded as having been transferred to the landlords who, since 1943 (but not in the contract subsisting on September 1, 1939) had been under an obligation in this respect.

(4) That as to repairs, the obligation of the tenant under the original tenancy in 1936 must be treated as comprehending an obligation to do external repairs; and that there must be treated as having been transferred to the landlords the burden of external repairs and also such repairs as were covered by the present exception of fair wear and tear, though the landlords were under no contractual obligation to the tenant to do them.

Winchester Court Ltd. v. *Miller* [1944] K.B. 734; 60 T.L.R. 498; [1944] 2 All E.R. 106 and *Asher* v. *Seaford Court Estates Ltd.* [1950] A.C. 508; 66 T.L.R. (Pt. 1) 943; [1950] 1 All E.R. 1018 applied.

(5) (Lord Evershed M.R. dissenting) that on the true construction of section 2 (3) there was a transfer of burden or liability within the meaning of the subsection whenever a given letting placed upon the tenant a burden or liability which rested on the landlord under the terms of the tenancy by reference to which the standard rent was fixed, or conversely placed upon the landlord a burden or liability which rested on the tenant under those terms; and that the expressions "previously borne by the landlord" and "previously borne by the tenant" meant borne by the landlord or tenant (as the case might be) under the terms of the letting by reference to which the standard rent was fixed, and that the expression "the previous terms" meant the terms of that letting, notwithstanding the terms of any letting or lettings there might have been between the lettings by reference to which the standard rent was fixed and the letting immediately in question. That, accordingly, there was on the letting to the present tenants a transfer to the landlords within the meaning of section 2 (3) of the burden or liability in respect of repairs which was cast on the landlords by the exclusion from the present covenant of exterior repairs

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[2] Law of Property Act, 1925, s. 62: "(1) A conveyance of land shall be "deemed to include and shall by "virtue of this Act operate to convey, "with the land, all buildings, erec-"tions, fixtures, commons, hedges, "ditches, fences, ways, waters, water-"courses, liberties, privileges, ease-"ments, rights, and advantages what-"soever, appertaining or reputed to "appertain to the land, or any part "thereof, or, at the time of convey-"ance, demised, occupied, or enjoyed "with, or reputed or known as part or "parcel of or appurtenant to the land "or any part thereof."

and of repairs attributable to fair wear and tear, and the supply of hot water and central heating which justified an increase of rent over the standard rent equivalent to the valuation of the burden in 1953.

Asher v. *Seaford Court Estates Ltd.* (supra) and *Winchester Court Ltd.* v. *Miller* (supra) applied.

Per Lord Evershed M.R. The estimation of the value of the obligation as to repairs, hot water and central heating by the landlords must be made by reference to the occasions when those obligations were, in effect, taken over by the landlords, that was in 1949 and 1943 respectively, and that the obligations could not be revalued for the purpose of rent increases in 1953.

APPEAL from Judge Clark, sitting at Clerkenwell County Court.

The following facts are taken substantially from the judgment of Jenkins L.J. The plaintiff landlords were the owners of a block of flats known as Northwood Hall, Hornsey Lane, Highgate, N.6. By a tenancy agreement dated February 12, 1953, the landlords let one of these flats (No. 0/16), which was admittedly a dwelling-house to which the Rent Acts applied, to the tenants on a monthly tenancy at the yearly rent of £123 6s. 3d. payable monthly in advance. Under this tenancy agreement the tenants covenanted to pay the general rates in respect of the flat and also to reimburse to the landlords any increase in the water rates beyond the amount payable on April 1, 1952, the landlords on their part covenanting to pay the water rate. It also contained the following covenant by the tenants as to repairs: "The tenant hereby agrees with the landlord . . . (c) To keep "the interior of the flat together with all fixtures and fittings now "or hereafter therein or appertaining thereto (including the doors "windows sanitary and water apparatus thereof) in good and "substantial repair and clean sanitary condition (fair wear and "tear and damage by accidental fire excepted), and so to deliver "up at the end or sooner determination of the tenancy hereby "created; . . ." There was the following covenant by the landlords as to the supply of constant hot water and central heating: "The landlord hereby agrees with the tenant . . . (c) To use its "best endeavours throughout the term to maintain at all times "a reasonable and adequate supply of hot water for domestic "purposes to the flat through the central installation (if any "such heating installation is installed in the building). Provided "that the landlord shall not be liable to supply hot water for "the central heating installation (if any) except during the cold "season between dates to be determined at the landlord's "discretion and provided also that the landlord shall not be "liable in damages in the event of any interruption of such "services."

By their particulars of claim dated June 30, 1955, the landlords alleged that by that tenancy agreement flat No. 0/16 was let to the tenants at a rent then standing at £140 14s. 4d. by virtue of certain increases permitted by the Housing Repairs and Rents Act, 1954; and that the tenants had failed to pay £19 7s. 6d. of that rent which had been due to the landlords for more than the period of 14 days specified in the proviso for re-entry; and they claimed possession of the flat, £19 7s. 6d. arrears of rent, and a declaration that the rent recoverable from the appellants in respect of the flat was £140 14s. 4d.

By their defence the tenants alleged, and it was not in dispute, that the standard rent of the premises was £115 per annum including water and general rates. They alleged further that the general rates at the date of the fixing of the standard rent were at least £21 17s. 4d.; that the present rent included water rates, which had increased by not more than 19s. 2d. per annum, but did not include general rates. They therefore contended that the recoverable rent was no more than £94 1s. 10d., and that, so far from rent being in arrear, the tenants had made over-payments amounting to £188 3s. 8d.; and they accordingly counterclaimed for the amount of the alleged over-payment.

The county court judge gave judgment for the landlords, dismissed the counterclaim and made a declaration as to the recoverable rent. The tenants appealed.

Gabriel Cohen and *James Borders* for the tenants. The questions for determination in this appeal fall under three heads: (1) rates, (2) repairs and (3) constant hot water and central heating. No question arises as to permitted increase under the Housing Repairs and Rents Act, 1954.

(1) *Rates.* On the liability for general rates being transferred to the tenant by the notice of February 20, 1947, "the corre-"sponding reduction" in the rent referred to in the proviso to section 2 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, ought to have been calculated on the rateable value of £41 at which the flat was originally let and not (as was in fact done) on the amended rateable value of £34. [Reference was made to *Woodside House (Wimbledon) Ltd.* v. *Hutchinson.*[3]] Further, the increase in rates in respect of which the notice of increase on April 20, 1946, was served was calculated

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[3] [1950] 1 K.B. 182; 65 T.L.R. 692; [1949] 2 All E.R. 709.

on a wrong basis; it was taken as being the difference between the increased rates and the rates payable in respect of the relevant earlier period on the amended rateable value of £34, but it should have been calculated on the difference between the increased rates and the rates payable in respect of the relevant earlier period on the rateable value of £41 at which the flat was originally included in the valuation list. That follows, it is submitted, from the words in section 2 (1) (*b*) of the Act of 1920, as amended, "the "corresponding amount paid in respect of the . . . period which "included September 1, 1939." The position is not altered by reason of section 37 (10) of the Rating and Valuation Act, 1925.

(2) *Repairs*. The question for determination is whether the rent increases of £14 on the letting to one Nitka in June, 1949, and of £11 on the letting to the present tenants in February, 1953, a total of £25, are justified under section 2 (3) of the Act of 1920. It is conceded that on the letting to Nitka there was a transfer (or a "shifting," to use Scott L.J.'s phrase in *Winchester Court* v. *Miller*[4]), to the landlords of "a burden previously borne by "the tenant" in that Nitka was relieved of repairing obligations which had fallen on previous tenants. The landlords are therefore entitled to an increase of £14 over and above the standard rent. They are not, however, entitled to a further increase of £11, since once there has been a transfer of burden to landlord from tenant and the compensating increase in rent to be made in respect of it has been agreed, or determined by the court under section 2 (6) of the Act, the landlord cannot claim any further increase in respect of that transfer on the ground of increased costs or otherwise. This follows from the language of section 2 (3) of the Act of 1920, for the words "previously borne by the tenant" and the words "not less favourable to the tenant than the previous "terms" mean, respectively, borne by the person occupying the position of tenant immediately before the date of the transfer or who last occupied that position prior to such date, and the terms of the letting in force at the date of, or of the last letting prior to, the transfer. Therefore, in order to discover whether a given letting effects a transfer of a burden, it is necessary to compare the terms of that letting with the terms of the letting which last preceded it, and if the burden in question was by the terms of the last preceding letting placed on the tenant and is likewise placed on the tenant by the terms of the new letting, then the new letting effects no transfer of such burden to the tenant under the first branch of section 2 (3) even though it was borne by the

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[4] [1944] K.B. 734, 743.

landlord under the terms of the letting by reference to which the standard rent was fixed. In the circumstances of the present case the increase of rent of £11 on the letting to the present tenant cannot be justified. *Asher* v. *Seaford Court Estates Ltd.*[5] is distinguishable, for in that case there were no intermediate tenancies.

(3) *Constant hot water and central heating.* On the arguments put forward concerning repairs, it also follows that there can have been no transfer to the landlords on the letting to the present tenants of any burden on this account, inasmuch as a covenant to provide these services was first introduced on the letting to one Clements in November, 1943, and that covenant was repeated in identical terms in the lettings to Nitka and the present tenants. In any event, the landlords have at all times been under a duty to supply the above services by reason of the provisions of section 62 of the Law of Property Act, 1925. [Reference was also made to *Wright* v. *Macadam.*[6]]

[The court intimated that it did not wish to hear argument on behalf of the landlords on the question of rates.]

Neil Lawson Q.C. and *Brian Galpin* for the landlords. The issues for determination now fall under the heads of (1) repairs and (2) central heating and hot water. The submissions of the landlords can be shortly stated.

(1) *Repairs.* The proper approach to this question is to consider the situation when the flat was vacant in 1953, that is, before the appellants became the tenants. At that date the landlords could have agreed to let the flat on the terms of the 1936 tenancy, which fixed the standard rent, but on condition that they assumed burdens or liabilities which under the 1936 agreement had been borne by the tenant. Accordingly, the landlords would be entitled by virtue of the Act of 1920 to charge more than the standard rent, and for the purpose of applying the relevant provision—section 2 (3)—comparison must be made between the terms of the 1936 tenancy and the terms of the proposed agreement in 1953. If, upon such comparison, it appears that an obligation which in 1936 rested on the tenant is under the 1953 agreement to be assumed by the landlords, then for the purposes of section 2 (3) there is, on the making of the 1953 contract, a transfer or "shifting" of the obligation to the landlords justifying an increase of rent over the standard rent equivalent to the valuation of the burden in 1953. It matters not that in

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[5] [1950] A.C. 508.

[6] [1949] 2 K.B. 744; [1949] 2 All E.R. 565.

the preceding tenancy agreement in 1949 the same burden had already been assumed by the landlords and that the standard rent had, on the making of that agreement, been increased by reference to the presumably smaller sum which had then represented the value of the obligation. It is submitted that the question has been answered, as contended by the landlords, beyond peradventure by the Court of Appeal in *Winchester Court* v. *Miller*,[7] and by the House of Lords in *Asher* v. *Seaford Court Estates Ltd.*[8] Accordingly, the landlords are entitled to the increased rent of £11.

(2) *Constant hot water and central heating.* The submissions put forward on behalf of the tenants cannot prevail in view of *Asher* v. *Seaford Court Estates Ltd.*[8]

Cohen replied.

Cur. adv vult.

April 27. Lord Evershed M.R. I will ask Jenkins L.J. to deliver the first judgment.

Jenkins L.J., having stated the facts, continued: The pleadings do not disclose the true issues. The plaintiffs in fact sought to justify the difference between the standard rent of £115 and the allegedly recoverable rent of £140 14s. 4d. on grounds which did not involve reliance on any increases permitted by the Housing Repairs and Rents Act, 1954, though there had apparently been at one stage an agreement that the increases so permitted should be taken as £17 9s. 9d. which, with a figure for the contractual rent of £123 4s. 7d., as compared with the rent in fact reserved by the tenancy agreement of £123 6s. 3d., would in fact give a recoverable rent of £140 14s. 4d. as alleged in the points of claim. It was agreed in the course of the hearing before us that, notwithstanding any agreement there may have been as to the amount of the increases permitted under the Act of 1954, that question should be considered as wholly at large so as to protect the tenants from a duplication of any increase which might be justifiable both under the Act of 1954 and on one of the other grounds on which the plaintiffs rely. The question of increases under the Act of 1954 can therefore be regarded as having passed from the case so far as the present appeal is concerned.

The true issues between the parties, as they emerged in the course of the hearing, may conveniently be dealt with under the three headings of (1) rates, (2) repairs, and (3) constant hot water and central heating.

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[7] [1944] K.B. 734, 745.

[8] [1950] A.C. 508. 518, 520, 532.

(1) *Rates.* It appears that Northwood Hall was built in 1936 soon after the current valuation list had been settled. This flat was added to the list by amendment at the rateable value of £41 and stood in the list at this figure on April 8, 1936 (the date of the original letting by which the standard rent was fixed), and thereafter down to March, 1941, when by an amendment of the list operating retrospectively as from April 1, 1935, its rateable value was reduced to £34, the retrospective operation of the amendment being attributable to section 37 (10) of the Rating and Valuation Act, 1925. The liability for general rates was transferred to the tenant by notice dated February 20, 1947. In 1946 there was an increase of general rates, in respect of which a notice of increase was served on April 20 in that year.

[His Lordship read section 2 (1) (*b*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and continued:] Subsection (3) of the same section contains this proviso: "Provided that, for the purposes of this section, the rent shall not "be deemed to be increased where the liability for rates is "transferred from the landlord to the tenant, if a corresponding "reduction is made in the rent."

On these statutory provisions, in their application to the facts above summarized, Mr. Cohen, for the defendants, made these submissions: (i) He contended that when the liability for general rates was transferred to the tenant by the notice of February 20, 1947, the "corresponding reduction" in the rent referred to in the proviso to section 2 (3) should have been calculated on the rateable value of £41 at which the flat was originally included in the valuation list and not (as was in fact done) on the amended rateable value of £34. This, I think, is clearly wrong. I entirely agree with the judge that the "corresponding reduction" to be made in the rent is the amount of the rates payable at the date of the transfer: see *Woodside House (Wimbledon) Ltd.* v. *Hutchinson.*[1] The relevant date here is February 20, 1947, and the proper reduction is the amount of the rates payable at that date calculated on the amended rateable value of £34 at which the flat stood at that date in the valuation list. (ii) Mr. Cohen contended further that the increase in rates in respect of which the notice of increase on April 20, 1946, was served was calculated on a wrong basis because it was taken as being the difference between the increased rates and the rates payable in respect of

[1] [1950] 1 K.B. 182.

the relevant earlier period on the amended rateable value of £34 and not, as in his submission it should have been, on the difference between the increased rates and the rates payable in respect of the relevant earlier period on the rateable value of £41 at which the flat was originally included in the valuation list.

The argument turns on the meaning in section 2 (1) (*b*) of "the corresponding amount paid in respect of the . . . period "which included September 1, 1939." Mr. Cohen submitted that the amount so paid consisted of the rates calculated on the original rateable value of £41 and not on the amended rateable value of £34. I think this argument breaks down on the facts, as appears from the following passage in the judgment of the learned judge: "Mr. Borders, of counsel for the defendants, "submits that it is established in evidence that the landlords in "fact paid the rates for that period on the basis of a rateable "value of £41, but I am not satisfied that this is so. The oral "evidence on this point was given by Mr. Buttle, the manager "of the plaintiff company's managing agents, and by Mr. Lay, "an officer of the Hornsey Borough Council. Neither of these "gentlemen had any personal knowledge of what happened "about these payments in 1939. But there has been put in "evidence a letter of August 9, 1941, from the Borough Treasurer "of Hornsey to the plaintiff company's managing agents which "clearly indicates that the rates for 1939/40 and 1940/41 for "Northwood Hall had not been settled and paid at that date; "there was then a very substantial balance outstanding even on "the revised assessments. That being so, the amount paid in "respect of the period including September 1, 1939, was the "amount ultimately paid on the revised valuation and not the "amount which had appeared to be payable on the valuation "originally made, and I find accordingly."

Moreover, I agree with the learned judge that, even if the rates in respect of the period including September 1, 1939, had in fact been paid on the original rateable value of £41, the retrospective operation of the amendment by virtue of section 37 (10) of the Rating and Valuation Act, 1925, demands that the rates paid in respect of that period should be treated as having been paid on the amended rateable value of £34, which, after the adjustment necessary to give effect to the retrospective amendment, would in the end represent the amount actually paid.

I am accordingly of opinion that the defendants fail on both their objections to the plaintiff's method of calculating the recoverable rent so far as the increase due to the increase in rates in 1946 and the reduction due to the transfer to the tenant in 1947 of the liability for general rates are concerned.

(2) *Repairs.* In order to deal intelligibly with this aspect of the dispute, it is necessary to state briefly the letting history of the flat. The first letting, by reference to which the standard rent of £115 was fixed, was a letting by the plaintiffs to Sudbury House Developments Ltd. under a tenancy agreement dated April 8, 1936, for three years from March 25, 1936, at the yearly rent of £115 payable quarterly. This letting was inclusive of general and water rates, which the landlord covenanted to pay, and it contained the following covenant by the tenant in regard to repairs: "The tenant hereby agrees with the landlord "... (*b*) To keep the flat in good tenantable and sanitary "preservation order and condition together with all the fixtures "and fittings belonging to the landlord in and about the flat "and on demand to make good any damage or want of repair "caused by neglect or default and in the last month before the "determination of the tenancy whether by effluxion of time or "otherwise to paint with materials and colours selected by the "landlord and with two coats of good oil paint enamel and "varnish the parts of the flat usually so treated and to strip "stop and hang the walls ceiling and other parts with paper "and materials in a suitable and workmanlike manner all the "interior parts of the flat which are usually so treated and in "such repair and condition to deliver up the flat at the end of "the tenancy." It appears that the tenant under this agreement held over at the end of the three years, and was still in occupation on the same terms on September 1, 1939.

The next letting was to one Clements under a tenancy agreement dated November 26, 1943. The rent under this letting was £117 17s. 1d. per annum, the increase as compared with the standard rent of £115 being apparently due to an increase in rates as to which there is no dispute. The only relevant difference between the terms of this letting as compared with the first was that it contained a covenant by the plaintiffs in, I understand, identical terms with those of the corresponding covenant by them in the defendants' tenancy agreement as to the supply of constant hot water and central heating.

Thirdly the flat was let to one Nitka under a tenancy agreement dated June 9, 1949, which differed from its predecessors in the material respect that for the covenant by the tenant as to repairs contained in the agreements of April 8, 1936, and September 26, 1943, there was substituted a covenant by the tenant limited to the repair of the interior of the flat with an exception of fair wear and tear, in, I understand, identical terms with the corresponding covenant by the defendants in their tenancy agreement. Under Nitka's tenancy agreement the tenant covenanted to pay the general rates (liability for which, it will be remembered, had been transferred to the then tenant by notice dated February 20, 1947) and any increase in the water rates, the landlord on his part covenanting to pay the water rate. There was also a covenant by the landlord as to the supply of constant hot water and central heating in, I understand, identical terms with those of the corresponding covenants in Clements's and the defendants' agreements. The rent was altered by what I have held to be the correct deduction on account of the transfer to the tenant of the liability to pay the general rates (which deduction had no doubt been in fact applied since the notice of February 20, 1947), and, on the other hand, increased by £14 on account of the transfer to the landlord of the liability for external repairs and the exception of fair wear and tear from the tenant's repairing covenant.

Finally, there was the letting to the defendants under the agreement of February 12, 1953, the material terms of which I have already stated, such terms being, as regards rates and repairs and, I think, in all other respects save the amount of the rent, identical with those contained in Nitka's tenancy agreement. The rent was, however, increased by a further £11 on account of the restriction to the interior of the flat of the tenant's repairing covenant and the exception from that covenant of fair wear and tear, that is to say, on account of the like departure from the terms of the 1936 letting as had been made the subject of the increase of £14 on the letting to Nitka.

Such being the letting history of the flat, the question to be determined is whether the two rent increases of £14 on the letting to Nitka and £11 on the letting to the defendants, making together an increase of £25, were justified under the provisions of section 2 (3) of the Act of 1920. That subsection (apart from the concluding proviso regarding rates, to which I have already referred) is in these terms: "Any transfer to a tenant of any "burden or liability previously borne by the landlord shall, for "the purposes of this Act, be treated as an alteration of rent, "and where, as the result of such a transfer, the terms on which "a dwelling-house is held are on the whole less favourable to "the tenant than the previous terms, the rent shall be deemed "to be increased, whether or not the sum periodically payable

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" by way of rent is increased, and any increase of rent in respect " of any transfer to a landlord of any burden or liability previously borne by the tenant where, as the result of such " transfer, the terms on which any dwelling-house is held are on " the whole not less favourable to the tenant than the previous " terms, shall be deemed not to be an increase of rent for the " purposes of this Act."

It is, I think, clear that on the letting to Nitka there was, within the meaning of the subsection, a " transfer to a landlord " (i.e., the plaintiffs) of a " burden or liability previously borne " by the tenant " (i.e., Clements and, before him, Sudbury House Developments Ltd.), inasmuch as the obligations imposed successively on Sudbury House Developments Ltd. and Clements, by their respective tenancy agreements, to repair the exterior of the flat and to do repairs attributable to fair wear and tear, were not imposed on Nitka by his tenancy agreement, so that what had been treated on the previous lettings as a tenant's burden or liability was made on the letting to Nitka a landlord's burden or liability. This accords with Scott L.J.'s construction of the word " transfer " as a synonym for " shifting " in *Winchester Court Ltd.* v. *Miller*,[2] where he said: " It is the " shifting of the burden that matters, not how or by whom it " is brought about." It is, I think, also clear that there was a " transfer " of this burden or liability to the plaintiffs even though they entered into no covenant with Nitka to do the repairs in question, for, having omitted to impose any covenant covering them on Nitka, they would either have to do these repairs themselves or allow their property to deteriorate. This again accords with the position in *Miller's* case,[3] and the observations upon that decision made by Asquith L.J. in *Seaford Court Estates Ltd.* v. *Asher*.[4]

Mr. Cohen did not, as I understood his argument, in the end dispute that on the letting to Nitka there was a transfer to the plaintiffs within the meaning of section 2 (3) of the repairing obligations of which Nitka, as compared with the previous tenants, was relieved. He suggested, however, that the compensating increase in rent, assessed by the plaintiffs at £14, ought to have been calculated by reference to the cost of performing the transferred obligations as at September 1, 1939, and not by reference to the cost of performing them at the date of the letting to Nitka (i.e., June 9, 1949). I see no justification for this. The transfer benefited Nitka to the extent of the current cost of performing the obligations transferred, and I see no reason why the compensating increase in rent should not be likewise assessed by reference to current cost. The practical difficulty of reverting to 1939, or I suppose in some cases 1914, for the purposes of this calculation would obviously be great.

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[2] [1944] K.B. 734, 743; 60 T.L.R. 498; [1944] 2 All E.R. 106.

[3] [1944] K.B. 734.

[4] [1949] 2 K.B. 481, 493; 65 T.L.R. 379; [1949] 2 All E.R. 155.

Mr. Cohen submitted that the increase of £11 made on the letting to the defendants could not be justified as a further increase in respect of the transfer of burden which took place on the letting to Nitka. He said that once a transfer of burden from tenant to landlord had taken place and the amount of the compensating increase in rent to be made in respect of it had been agreed, or determined by the court under section 2 (6) of the Act, the landlord could not claim any further increase in respect of that transfer on the ground of increased costs or otherwise.

The relevance of that argument depends on the validity of Mr. Cohen's main submission on this part of the case, which was to the effect that the one and only transfer to the plaintiffs of any burden in respect of repairs was the transfer which took place on the letting to Nitka, and that there was no further or other transfer of such burden to the plaintiffs on the letting to the defendants, inasmuch as that letting left the burden precisely where it was placed by the letting to Nitka, that is to say, on the plaintiffs. If the only transfer in the case was the transfer effected on the letting to Nitka, then, said Mr. Cohen, there could be no warrant for making any increase in the rent on the letting to the defendants over and above the £14 already added on the letting to Nitka. This argument turns on the true construction of section 2 (3) and in particular on the meaning of the words "previously borne by the tenant" and the words "not less favourable to the tenant than the previous terms." According to Mr. Cohen's submission, "previously borne by the "tenant" means borne by the person occupying the position of tenant immediately before the date of the transfer or who last occupied that position prior to such date, and "the previous "terms" means the terms of the letting in force at the date of, or of the last letting prior to, the transfer. Thus, according to Mr. Cohen's submissions, in order to ascertain whether a given letting effects a transfer of a burden or liability, one must compare the terms of that letting with the terms of the letting which last preceded it, and if the burden or liability in question was by the terms of the last preceding letting placed on the tenant and

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is likewise placed on the tenant by the terms of the new letting, then the new letting effects no transfer of such burden or liability to the tenant under the first branch of section 2 (3) even though it was borne by the landlord under the terms of the letting by reference to which the standard rent was fixed; while conversely if the burden or liability in question was by the terms of the last preceding letting placed on the landlord and is likewise placed on the landlord by the terms of the new letting, then the new letting effects no transfer of such burden or liability to the landlord under the second branch of section 2 (3), even though it was borne by the tenant under the terms of the letting by reference to which the standard rent was fixed.

The plaintiffs disputed the construction placed on section 2 (3) of the Act of 1920 by Mr. Cohen and contended, in effect, that there was a transfer of a burden or liability within the meaning of the subsection whenever a given letting placed on the tenant a burden or liability which rested on the landlord under the terms of the tenancy by reference to which the standard rent was fixed, or conversely placed on the landlord a burden or liability which rested on the tenant under those terms. They contended further, in effect, that upon the true construction of the subsection the expressions "previously borne by the "landlord" and "previously borne by the tenant" mean borne by the landlord or tenant (as the case may be) under the terms of the letting by reference to which the standard rent was fixed, and the expression "the previous terms" means the terms of that letting, notwithstanding the terms of any letting or lettings there may have been between the letting by reference to which the standard rent was fixed and the letting immediately in question.

I will not attempt to repeat in my own words what has been better said by others, but will content myself by observing that the construction for which the plaintiffs contend appears to me to have received the considered approval of this court in *Winchester Court Ltd.* v. *Miller*[5] and of the House of Lords in *Asher* v. *Seaford Court Estates Ltd.*,[6] in terms which for my part I find it impossible to pass over as mere obiter dicta. I refer in particular to the passages quoted in the judgment of Hodson L.J. in the present case,[7] which I have had the advantage of reading.

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[5] [1944] K.B. 734.

[6] [1950] A.C. 508; 66 T.L.R. (Pt. 1) 943.

[7] Post, pp. 630, 631.

In conformity with the views expressed in those cases, I hold that in the present case there was on the letting to the defendants a transfer to the plaintiffs within the meaning of section 2 (3) of the burden or liability in respect of repairs which was cast on the plaintiffs by the exclusion from the defendants' covenant of exterior repairs, and of repairs attributable to fair wear and tear, notwithstanding that the immediately preceding letting to Nitka had cast on the plaintiffs the like burden or liability.

It follows that, in my opinion, the defendants' objection to the plaintiffs' claim to include in the recoverable rent the appropriate increase in respect of the transfer to the plaintiffs of this burden or liability on the letting to the defendants must fail. I should add that the increase must, in my opinion, be based on the cost to the plaintiffs of performing the transferred burden or liability in respect of repairs as at the date of such transfer, due allowance, of course, being made for the addition of £14 to the rent on the letting to Nitka. I understand that a figure has been agreed on this basis.

(3) *Constant hot water and central heating.* A covenant by the plaintiffs as to the provision of these services was, as appears above, first introduced on the letting to Clements, and repeated in identical terms in the lettings to Nitka and the defendants. Mr. Cohen, for the defendants, used the same argument (with the substitution of Clements for Nitka) as was advanced by him in regard to the liability to repair, i.e., that there could have been no transfer to the plaintiffs on the letting to the defendants of any burden or liability on this account, inasmuch as the relevant covenant had already been included in the terms of the lettings to Clements and Nitka. In my opinion, that argument must be held to fail in the matter of constant hot water and central heating as I have held it to fail in the matter of repairs.

But certain other points requiring notice were also raised on this part of the case. First, it was said that there was no transfer to the plaintiffs of any obligation to supply constant hot water or central heating, because the plaintiffs were throughout under an obligation to do so by virtue of section 62 of the Law of Property Act, 1925. I think this is clearly wrong. The obligation in question involves the performance of services, and is essentially a matter of personal contract as distinct from a right, easement or privilege capable of being granted by lease or conveyance so as to pass under the general words implied by

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section 62. Next, it was said that there was no transfer or burden in this respect because from the outset constant hot water and central heating were in fact supplied by the plaintiffs. I have some sympathy with this argument, for the flat was so laid out and equipped as to make it plain that the plaintiffs intended to supply constant hot water and central heating, and in practice they could not have ceased to do so without adverse consequences to their goodwill and their prospects of finding tenants for their properties. Nevertheless, I am not prepared to hold that the plaintiffs were under any legal obligation to supply constant hot water and central heating for the flat before their covenant in that behalf contained in Clements's tenancy agreement. If they were not under any such legal obligation, then I think we are bound by the combined effect of *Miller's* case [8] and *Asher's* case [9] to hold that on the letting to the defendants there was, within the meaning of section 2 (3), a transfer to the plaintiffs of a burden or liability previously borne by the tenant, in the shape of the obligation to supply central heating and constant hot water, inasmuch as under the letting of 1936, by reference to which the standard rent was fixed, the plaintiffs assumed no legal obligation to provide such supply, so that in point of legal liability the position then was that, while the plaintiffs might voluntarily provide such supply, the tenant could not compel them to do so, and, therefore, in the eye of the law the supply of constant hot water and central heating for the flat was a burden or liability borne by the tenant. The result, which I confess I do not find wholly satisfactory, is that an increase of rent is now exigible for services which, for all practical purposes, were included in the original standard rent of £115. But, in view of *Asher's* case,[10] this conclusion is one from which I see no escape.

Finally, it was argued that the form of the covenant as to the supply of constant hot water and central heating was such as to impose no legal obligation on the plaintiffs, inasmuch as they only covenanted to use their best endeavours to maintain the supply of constant hot water and central heating, and were themselves to determine the dates marking the beginning and end of the cold season to which the provision of central heating was to be limited. I do not agree that the covenant imposed no legal obligation. The plaintiffs assumed a legal obligation to

[8] [1944] K.B. 734.

[9] [1950] A.C. 508.

[10] Ibid.

do their best. Nor do I think it would be open to them to nullify the covenant as regards central heating by a purely arbitrary selection of dates. It may be that a covenant in this qualified form is qua legal obligation to some measurable extent less valuable than an unqualified covenant (which, I imagine, few proprietors of flats would be prepared to enter into on a matter of this sort). But the figure representing the addition to the rent to be made in respect of the value of these services on the footing that there was a transfer to the plaintiffs of the burden or liability of providing them has, I understand, been agreed, and I do not think it should be reopened on this account.

I therefore conclude that the defendants fail on all points, with the result that this appeal should be dismissed.

HODSON L.J. In my opinion, the judgment of the judge was right and his order should stand, subject to the proposed variation in the declaration dealing with any future agreement or determination under the Housing Repairs and Rents Act, 1954. I agree with the other members of the court on the main questions raised on this appeal, and will confine myself to consideration of the question of the dates when the transfers of burdens took place, (1) as to the supply of hot water and central heating, (2) as to repairs. On this matter, since there is a difference of opinion in this court, it is necessary that I should express my own view.

The flat, O/16 Northwood Hall House, having been first let by an agreement of April 8, 1936, which fixed the standard rent, the plaintiffs first undertook the liability for the supply of hot water and central heating when they let the flat to one Clements on November 26, 1943, and first undertook the liability for repairs when they let the flat to one Nitka on June 9, 1949. They claim, however, that they can charge an increase of rent or, to put it more accurately, obtain payments in respect of such transfers of burdens or liabilities which shall be deemed not to be increases of rent within the meaning of section 2 (3) of the Act of 1920 on the footing that the transfers of burdens or liabilities took place on the date of the letting to the defendants on February 12, 1953. The defendants contend that no transfer took place in 1953, for the transfers had already occurred in the case of the hot water burden in 1943, and in the case of the repairs burden in 1949. At first impression the defendants' contention would appear to be correct, for, comparing the letting in 1953 with the previous letting in 1949, there was in 1953 no transfer to the landlord of any burden or liability previously borne by the tenant. The burdens and liabilities were then, as they had been previously, borne by the landlord. Section 2 (3) of the Act of 1920 has, however, been judicially considered, and I think it is clear from the authorities, in particular *Winchester Court Ltd.* v. *Miller*[11] and *Asher* v. *Seaford Court Estates Ltd.*,[12] that the terms of the existing tenancy are to be compared with the terms of the tenancy which established the standard rent.

In the present case, the standard rent was established by the letting of the flat on April 8, 1936, and, if one compares the terms of the first letting with the terms of the 1953 letting, there has admittedly been a shifting of the burden. It is true that in the two cases I have mentioned the precise point to be determined in the present case did not arise, for, although in the former case there had been a series of lettings, there was no attempt by a landlord to reassess a burden previously evaluated on an earlier transfer as there is in this case. Nevertheless, in my opinion, the plaintiffs are entitled so to do.

The argument that the words "previously borne" in subsection (3) must mean borne immediately before the transfer was expressly rejected in *Winchester Court Ltd.* v. *Miller.*[13] Scott L.J. accepted the argument put forward by the landlords that the object of section 2 (3) is to preserve the equilibrium as between the liabilities of the landlord and tenant established by the legislative fixation of the standard rent of a dwelling-house. He said[14]: "The language of the subsection which contains this "statutory recognition of the fundamental principle of equilibrium ought, in my opinion, to be liberally construed so as to "give effect to that principle, if its words permit that construction, and I think they do. For these reasons I would construe "the word 'transfer' as a synonym for 'shifting' because the "emphasis of the section is on the fact of a change in the "equilibrium. It is the shifting of the burden that matters, not "how or by whom it is brought about." This last sentence was quoted with approval by Lord MacDermott in *Asher* v. *Seaford Court Estates Ltd.*[15] Mackinnon L.J. expressed the opinion[16] that the tenant who previously bore the burden must be or include the tenant by a demise to whom the standard rent was fixed, and the "previous terms" must mean or include the terms of the previous tenancy which fixed the standard rent.

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[11] [1944] K.B. 734.
[12] [1950] A.C. 508.
[13] [1944] K.B. 734.
[14] Ibid. 743.
[15] [1950] A.C. 508, 526.
[16] [1944] K.B. 734, 745.

In *Asher* v. *Seaford Court Estates Ltd.*[17] Lord Porter said: "The rent, in my opinion, is increased by the landlord 'in "'respect of' the transfer of a burden or liability where a "greater burden or liability has been imposed on the landlord by "the terms of a particular letting than was imposed on him by "the terms of the letting under which the standard rent is "ascertained. It is that change by which the increased rent "is justified and in respect of which it is rightly made." Lord Normand used language to the same effect.[18] Lord Reid said[19]: "The Rent Acts do not prevent a landlord who lets his house to "a new tenant from undertaking different obligations from those "undertaken by him in the lease which determined the standard "rent. This lease may have imposed onerous obligations on the "landlord, with the result that the rent was high. Apart from "section 2 (3) of the Act of 1920 there is nothing in the Acts "to prevent the landlord from making a valid bargain with a "new tenant under which the tenant pays the full standard "rent but does not get the favourable conditions contained in "the last tenant's lease. Conversely, the lease which determined "the standard rent may have imposed onerous obligations on the "tenant, with the result that the rent was low. The landlord "could of course give a new tenant more favourable conditions; "but, apart from section 2 (3), he would not on that account be "entitled to raise the rent. An agreement by the tenant to pay "more in return for the alteration of terms would be unenforce-"able and money paid under such an agreement would be "recoverable." Thus, in my opinion, whenever there is a tenancy which puts a greater burden on the shoulders of one party than the original tenancy placed on those shoulders, there is a shifting.

Bearing in mind the two propositions established by the cases cited—first, that the words "previously borne" are not limited to a tenancy immediately preceding the transfer; second, that a shifting is sufficient to satisfy the word "transfer"—I think that it is still true of the agreement of 1953 that there was then a shifting of the burden as between landlord and tenant notwithstanding that the same was true of the 1943 and 1949 agreements.

The position when the defendants came forward as prospective tenants was that the plaintiffs could have let to them on

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[17] [1950] A.C. 508, 518.

[18] Ibid. 520.

[19] Ibid. 532.

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exactly the same terms as those on which the flat was let to the original tenants. The plaintiffs were under an obligation not to charge more than the standard rent, but they could have imposed on the defendants the full liabilities of the 1936 agreement. If the defendants had agreed to a tenancy on those terms, the weight of the burden would have been determined by the cost to the tenant ascertained at that date. In 1953 this course was not taken by the parties, but the plaintiffs must, I think, as the county court judge thought, be regarded as having said to the defendants: "We are prepared to vary the original terms by "undertaking to supply you with hot water and central heating "and by freeing you from the liability under a full repairing "covenant if you are prepared to pay £X, that is to say, the "present annual value of those burdens in addition to the "standard rent of the flat." When the defendants entered into the agreement, there was then a shifting to the landlords of the burden which had previously lain on the shoulders of the original tenant by reference to whose tenancy the standard rent was fixed.

In my opinion, therefore, the transfers of burdens and liabilities did take place on February 12, 1953, and are to be valued as at that date. The appeal, therefore, should be dismissed.

LORD EVERSHED M.R. Save upon one point, I agree with the two judgments that have just been delivered. Thus, I agree (1) as regards rates: that upon the transfer in February, 1947, of the liability for general rates (and no point arises as to the water rate) the appropriate amount whereby the rent had to be reduced was an amount corresponding to the rates payable in respect of the premises at the date of the transfer, and that the amount or amounts by which in the meantime the rent could be lawfully increased corresponded to the increase or increases in the rates over the sum paid and payable for rates on September 1, 1939, upon the basis of the amended valuation of £34 duly made retrospective to a date anterior to September 1, 1939, by virtue of section 37 (10) of the Rating and Valuation Act, 1925. (2) As regards the provision of hot water and central heating: (a) that the right to receive a supply of hot water, etc., cannot be treated as having passed to the original tenant in 1936 by virtue of section 62 of the Law of Property Act, 1925, not being a right or privilege of the kind contemplated by that section; and I add that if Mr. Cohen's point be a good one, then it must have been wholly overlooked in *Asher's* case,[20] to which I later return: (b) that the terms of clause 3 (c) of the appellant's contract of tenancy cannot be regarded as of so vague a character as not to impose any enforceable obligation at all—though I agree with Jenkins L.J. that its terms do impose a somewhat less valuable and comprehensive obligation than the comparable covenant in *Asher's* case,[21] a matter not, however, relevant for the purposes of the present case; and (c) that we cannot, consistently with loyalty to the speeches of the majority of the House of Lords in *Asher's* case,[22] hold otherwise than that the burden of supplying hot water, etc., must be regarded as having been transferred to the landlords who, since 1943 (but not in the contract subsisting on September 1, 1939), have been under the obligation in this respect now contained in clause 3 (c) of the present tenancy. Upon this matter I venture respectfully to associate myself with Jenkins L.J.'s feeling of dissatisfaction, having regard in the present case to the character and quality of this flat and the apparatus with which it has at all times been supplied. I add also that nothing that this court says in the present case affects the case of any other tenant who could prove that he or his predecessor, under a contract of tenancy subsisting on September 1, 1939, had, upon entering into such contract, made a collateral contract with the landlords for the supply of hot water, etc., by the latter. (3) As to repairs: that, upon the authority of *Asher's* case[23] and of *Miller's* case[24] (also hereafter mentioned) (a) the obligation of the tenant under the original tenancy must be treated as comprehending an obligation to do external repairs, and (b) there must be treated as having been transferred to the landlords the burden of external repairs, and also such repairs as are covered by the present exception of fair wear and tear, though the landlords are under no contractual obligation to the tenant to do them. I also think that since, on the figures found or agreed, the sum of £14 added to the rent in Nitka's contract was less than the true value of the burden then treated as transferred, it was competent for the landlords to make in the contract with the defendants such further addition to the rent as represented the difference between £14 and the true value of the burden at the date of Nitka's contract, such addition not being so remote from the occasion of the transfer in Nitka's contract as not fairly to be "in respect of" such transfer within the terms of Asquith L.J.'s judgment in *Asher's* case.[25]

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[20] [1950] A.C. 508.
[21] Ibid.
[22] Ibid.
[23] Ibid.
[24] [1944] K.B. 734.

But the question of liability for repairs raises another question which arises also in relation to the assumption by the landlords in 1943 and thereafter of the contractual obligation to supply hot water, etc., in the terms contained in clause 3 (c) of the present contract of tenancy. It is, to my mind, the only question of real difficulty in the present appeal, and upon it I have the misfortune to find myself at variance with the view of the county court judge and also of my brethren. It turns upon the effect of the second half of subsection (3) of section 2 of the Act of 1920 (omitting the proviso). The subsection has already been read and I do not read it again, but its language is, plainly enough, upon the face of it, somewhat artificial and involved. The judgment of Asquith L.J. in the Court of Appeal in *Asher's* case,[26] which was substantially adopted by the House of Lords in the same case, contains a full exposition of its requirements; but the present question, which did not at all arise upon the facts in *Asher's* case,[27] cannot, in my judgment, be treated as determined one way or the other by anything said either in this court or in the House of Lords in that case. The question (and, for brevity, I confine myself to its application to the matter of repairs) is, briefly, this: Since by the terms of the tenancy operative on September 1, 1939 (which I will for convenience call "the starting date"), the tenant's liability for repairs extended to external repairs and was unqualified by the exception of fair wear and tear, can the landlords justify a claim to an increase in the standard rent (being the rent payable on the starting date) upon the making of the contract of tenancy with the defendants in 1953, by virtue of the fact that the tenants in such contract were absolved from liability for external repairs and for fair wear and tear (which, as I have said, must be treated for present purposes as constituting an assumption by the landlords of an equivalent burden), notwithstanding that the terms of the 1953 contract in this respect were precisely the same as the previous contract of tenancy made with Nitka in 1949?

It is the contention of the landlords that this question must be answered affirmatively. Mr. Lawson's argument on the landlords' behalf is that, for the purpose of applying section 2 (3) of the Act, comparison can and must be made between the terms of the tenancy subsisting at the starting date and the terms of the contract made in 1953; that if, upon such comparison, it appears that an obligation which on the starting date rested upon the tenant is under the 1953 contract assumed by the landlords, then for the purposes of section 2 (3), there is, on the making of the 1953 contract, a transfer—that is, a "shifting" (see *per* Scott L.J. in *Winchester Court Ltd.* v. *Miller*,[28] hereafter mentioned)—of the obligation to the landlords justifying an increase of rent over the standard rent equivalent to the valuation of the burden in 1953; and that it is irrelevant that in the preceding 1949 contract the same burden had already been assumed by the landlords and that the standard rent had, on the making of that (1949) contract, been increased by reference to the (smaller) sum which had then represented the value of the obligation. For the defendants, on the other hand, it is argued that for the purposes of the subsection the shifting occurs when, but only when, the burden having previously been what I will call a "tenant obligation," becomes a "landlord obligation," and that the value of the burden, for the purposes of increasing the standard rent, must be arrived at once and for all in reference to that date—unless and until it is re-transferred or re-shifted back again to the tenant. According to this view of the subsection, the words in the subsection "previously borne" must mean "borne immediately before the transfer or shifting."

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[25] [1949] 2 K.B. 481, 493.

[26] Ibid.

[27] [1950] A.C. 508.

Mr. Lawson forcibly argued before us that the question must be treated as having been decided in his favour by the judgments of this court in *Winchester Court Ltd.* v. *Miller*,[29] and in the circumstances it is necessary to examine somewhat closely the facts in that case and the report of the arguments and judgments. The facts, so far as relevant, may be shortly stated. The flat in question had been on the starting date (September 1, 1939), the subject of a contract of tenancy in favour of A, whereby, as in the present case, the tenant had been under an unqualified repairing obligation. Later, in 1941 and again in March and November, 1942, the flat had been the subject of new contracts of tenancy, in each case to B. In each case the tenant's repairing liability had been qualified by an exception of fair wear and tear, but in no case had the landlords claimed any increase in the standard rent by reference to the transfer of the fair wear and tear burden under section 2 (3) of the Act. In August, 1943, the landlords determined the November, 1942, letting and then claimed for the first time, as a condition of B's continued occupation, an increase of rent equivalent to the valuation of the transferred fair wear and tear burden. As appears from the report,[30] the sum representing this value had been agreed at £20; but it is of the highest importance for present purposes to note that this sum was not referable to the value at any particular date, i.e., 1941, March or November, 1942, or August, 1943; and no question was therefore, so far as I can find, raised whether, if any increase in rent was justifiable, it must be quantified in relation to the date when the burden was first transferred as distinct from the date of the notice, namely, August, 1943. The county court judge had held that, in order to be within the terms of the subsection, a transfer of burden must be a transfer to the same tenant who had borne the burden immediately before the increase in rent and that therefore the landlords' claim to increase the rent against B (who had in fact never himself borne the transferred burden) must fail. All the members of this court rejected that view, holding that the word "tenant" was not confined to the tenant occupying the dwelling-house at the time when the claim for increase was made, but "included" the tenant at the starting date, that is A, who was, in the case before the court, the only other relevant tenant. This court also, by a majority (Scott and Mackinnon L.JJ., Luxmoore L.J. dissenting), held that an increase under section 2 (3) could be made in invitum against the then occupying tenant, if otherwise justified.

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[28] [1944] K.B. 734, 743.

[29] [1944] K.B. 734.

It is clear then, in my judgment, that the difficult question with which we are now concerned was neither raised nor determined by this court. It is true that counsel for the tenant is reported as submitting in the course of his argument[31]: "'Previously borne' must mean 'borne immediately before the 'transfer.' No other point of time is indicated in the subsection. The only alternative meaning would be 'borne at 'any time previously,' but that would lead to an impossible position as there might have been several tenancies with different covenants. If the meaning intended were 'borne at 'the date by reference to which the standard rent is to be 'fixed,' the sub-section would have had words to that effect." But that argument was being addressed to the question who was meant by "tenant." As appears immediately after the words I have quoted, the landlords were claiming (according to counsel) that the transfer had taken place in 1941 and not (as would be required to support the present argument) in August, 1943. It is true also that Scott L.J., in the course of his judgment, laid great stress on what he refers to as "the equilibrium" which, under the scheme of the Act, is to be treated as established between landlord and tenant at the starting date by the fixing of the standard rent on that date, so that all changes in rent required or justified under section 2 must be required or justified in relation to the standard rent. But there is nothing, in my judgment, amounting, expressly or implicitly, to the conclusion that there should be a re-assessment of the burden by reference to the standard rent on the grant of each subsequent new tenancy.

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[30] [1944] K.B. 734, 735.

[31] Ibid. 738.

In my judgment, accordingly, and with all respect to the contrary opinion of my brethren, *Winchester Court Ltd.* v. *Miller*[32] does not provide the answer to the present question. I have also already expressed my own view that it is left open by *Asher's* case,[33] where the only contracts of tenancy under consideration were (1) a contract subsisting on the starting date and (2) a contract made in 1943 whereunder the landlord assumed a contractual obligation which had not found any place in contract No. (1); and where the only question which fell to be determined was whether on the facts there had been any transfer of a burden or liability at all. I cannot for my part treat the passages from the speeches in *Asher's* case[34] which Hodson L.J. has read as determining the question to which they were not directed. I have referred to *Property Holding Co.* v. *Clark*,[35] to which reference was made during the argument, but I have not found there any guide to our decision. The question must, therefore, in my judgment, be answered by construing the relevant language of section 2 (3) of the Act.

The subsection, apart from the proviso in the last three lines, consists of two contrasted or complementary provisions. The first deals with the case of a transfer of a burden or liability from the landlord to the tenant, and the second with the converse case of a transfer from the tenant to the landlord. It is, in my judgment, clear, following *Miller's* case,[36] that by the terms "the tenant" and "the landlord" are meant the persons occupying for the time being and at the relevant time the position of tenant and landlord respectively in respect of a given dwelling-house within the Act. By expanding the formulae in its two halves the subsection may then be regarded as dealing with the shifting to the tenant, for the time being, of a "landlord "obligation" and with the shifting to the landlord for the time being of a "tenant obligation." So much would not, I think, be disputed. But, in my judgment, the subsection is concerned and only concerned with the consequences in terms of rent arising from the fact of the shifting and related to that specific occasion. This result, to my mind, follows in the first place from the language occurring in each half of the subsection: ". . . where, "as the result of such a transfer, the terms on which a dwelling-"house is held are," etc.; for the words "is held" seem to me to require that the essential condition which the words quoted imposes shall be satisfied by reference exclusively to the facts as they are found to be immediately after and as a consequence of the transfer. But, second, the same conclusion is, in my judgment, the inevitable consequence of the natural meaning, in their context, of the words "previously borne by," which I construe as meaning "borne immediately before the occasion of the "shifting": and the same construction must naturally, in my judgment, be given to the word "previous" in the phrase "not "less favourable . . . than the previous terms." If this view is right, it follows that the estimation of the value of the repairing obligation and the obligation as to hot water, etc., by the landlords must be made by reference to the occasions when those obligations were (in effect) taken over by the landlords, that is, in 1949 and in 1943 respectively, and that the obligations cannot be revalued for the purpose of rent increases in 1953.

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[32] [1944] K.B. 734.

[33] [1950] A.C. 508.

[34] Ibid. 518, 520, 526, 532.

[35] [1948] 1 K.B. 630; 64 T.L.R. 76; [1948] 1 All E.R. 165.

[36] [1944] K.B. 734.

My view strictly follows the argument of counsel in *Miller's* case,[37] which I have already quoted. But, though the point to which the argument was directed was rejected, I do not find that Scott L.J. or either of his colleagues expressed any disapproval of the argument as such; and, as I have more than once said, the point to which the argument is now directly relevant was not then before the court.

It is said on the other side that "previously borne" means in effect borne at the starting date; but I am unable to accept this view. If the intended reference had been to the starting date, then, as it seems to me, Parliament would have used for the purpose the appropriate language which it used in fact elsewhere: see subsection (1) (*a*). Such a construction, moreover, would not, as I think, fit with the effect of the language "where, "as a result of the transfer, the terms on which a dwelling-house "is held." Furthermore, such a construction would necessarily assume that the incidence of the obligation must be different at

[37] [1944] K.B. 734, 738.

the starting date and the date in respect of which the claim for increased rent is made. But this might well not be so. Suppose a case in which, at the starting date, the relevant repairing obligation was upon the shoulders of the landlord, that it was later shifted to the tenant, and then that it was later shifted back again to the landlord and continued in successive tenancies to remain on the landlord's shoulders. In such a case, according to the respondents' construction, no increase of rent could be claimed by the landlord over the standard rent in respect of the shifting back of the burden, however much the cost of the burden had in the meantime increased.

It is said that, if my view is right, then the landlord can, in such a case as the present, get no compensation by way of increase of rent for the added cost of his repairing (and hot water) obligations in 1953. This, I concede, may well be so. But the result is to show that in this respect, as in others, the code of the old rent restriction legislation may have fallen short of attempting to do complete justice. The result, after all, is the same in cases where the obligations have remained, ever since the starting date, upon the landlord. For, apart from the limited, special and quite different provisions of subsection (1) (*d*), no provision is made by section 2 for giving to the landlord any compensation by way of increased rent for increases in the cost to him of performing his obligations under the tenancy, save only in the case of rates. The reason may no doubt be sought in the circumstance that rent restriction legislation was originally conceived as a temporary expedient for relieving hardships arising out of emergency conditions. The defect has been since remedied by the Housing Repairs and Rents Act, 1954.

I have not so far referred to the proviso in the last three lines of subsection (3). I agree that the proviso relates only to rates; but its language makes it, in my judgment, clear that in the case of rates the estimation of the cost or value of the burden transferred must be made exclusively in relation to the date or occasion when the transfer in fact occurs. For my part, I see no reason for assuming that a different principle of computation is applicable in cases of the transfer of burdens other than the burden of rates.

In my judgment, accordingly, the defendants are entitled to succeed to the extent of establishing that the increases of rent attributable to the transfer of the burdens as to repairs and hot water services must be calculated by reference to their cost in

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1949 and 1943 respectively and cannot be re-assessed in 1953. The total effect of this view, if well founded, would be, as I understand, to reduce the amount of the recoverable rent which the county court judge has declared to be the sum of £138 9s. 4d. by approximately £15 per annum from February 12, 1953, with not unsubstantial results to the proper conclusion upon the claim and counterclaim. But, since upon the last question on which I have expressed my own view, the opinion of my brethren is to the opposite effect, the result is that the appeal must be dismissed.

I add two final observations. (1) Although, no doubt, some matters of principle and general interest have been discussed on this appeal, the actual figures applicable to the case have, as I understand, all been found or agreed, and to that extent therefore our decision in the present case cannot be regarded as covering other cases. (2) It has been agreed by counsel before us that, notwithstanding the final paragraph of the order under appeal, our decision is entirely without prejudice to any question which the landlords may raise upon an application under the Housing Repairs and Rents Act, 1954, or to any question which the defendants may put forward upon such an application. The form of the order appealed from will be varied accordingly to make this clear.

Appeal dismissed with costs. Order varied so as to read "*It is hereby determined that* "*the recoverable rent in respect of the premises is* £138 9*s.* 4*d. per annum, together* "*with such sum, if any, as may be agreed or* "*determined under the provisions of the*" *Housing Repairs and Rents Act*, 1954.

Leave to appeal to the House of Lords.

Solicitors: *F. R. Earle; Stikeman & Co.*

J. A. G.

INLAND REVENUE COMMISSIONERS *v.* HAMBROOK.

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Mar. 5, 6, 7, 14.

Lord Goddard C.J.

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July 23, 24, 30.

Denning, Birkett and Parker L.JJ.

Master and Servant—Per quod servitium amisit, action—Civil servant —Injury by accident—Crown's claim for loss of services not maintainable—Action limited to claims in respect of "menial servants" —Measure of damages—Voluntary payment of wages during sickness—Wages not recoverable as such—Wages as measure of value of lost services.

Civil Service.

A tax officer, an established civil servant, was injured, when off duty and riding his motor-cycle, in a collision with a motor-car driven by the defendant. The civil servant (who was admittedly one-third to blame for the accident) was off work for nearly 10 months, during which time the Inland Revenue Commissioners paid him sick pay. In an action for damages per quod servitium amisit by the Crown for recovery of that sum Lord Goddard C.J. gave judgment for the defendant, holding (1) that an established civil servant was appointed to an office and was a public officer remunerated by moneys provided by Parliament, so that his employment depended, not on a contract with, but on appointment by the Crown; (2) that, as a public officer, he had no right of action for wrongful dismissal although he could recover his salary for the time he had served; ? (3) that the action per quod servitium amisit rested on a master and servant relationship which was wholly different in kind from that of the Crown and an established civil servant whose duties were of a public nature and in part at least laid down by statute; (4) that even if the relationship between the Crown and a civil servant was contractual, a contract which gave no remedy to the employee against his employer for its breach was wholly different in kind from those which had hitherto supported this type of action which should not be extended beyond its present limits; and (5) that in this form of action damage was an essential ingredient, and since the payment of sick pay was a voluntary act in the discretion of the Crown, it did not amount to damage in law.

On appeal by the Crown:—

Held, that the action per quod servitium amisit at the instance of a master now lay only where the servant could properly be regarded as a member of the master's domestic household—a "menial" servant. Accordingly, it did not lie in respect of an established civil servant or of this tax officer, whose relationship with the Crown was wholly different in kind from that to which the action originally applied or had been extended by binding or long recognized authority.

Per Denning L.J. The action does not lie at the instance of governments, limited companies, or other employers who keep no household.

Per Parker L.J. The action would not lie even if the servant were a mere clerk or typist.

Attorney-General for New South Wales v. *Perpetual Trustee Co. Ltd.* [1955] A.C. 457; [1955] 1 All E.R. 846 applied.

Attorney-General v. *Valle-Jones* [1935] 2 K.B. 209; 51 T.L.R. 239 disapproved.

Per Denning and Parker L.JJ. If this action lay generally wherever the relation of master and servant existed, the Crown would not necessarily be debarred from bringing it simply because it was the Crown or because there is no normal contract of service between the Crown and its servants; for the action depends, not on the existence of a contract of service, but on the fact of service.

Per curiam. (1) An additional reason for not extending the scope of this action would be the anomalous result that, despite the contributory negligence of this servant, the Crown might have been entitled to recover the full amount without any reduction, for that followed logically from treating a servant as a chattel of his master.

(2) Though the amount of sick pay, being a voluntary act of bounty by the Crown, was not recoverable as such, it might be used as a convenient measure of the value of the lost services.

Rex v. *Richardson* [1948] S.C.R. 57 considered.

Admiralty Commissioners v. *S.S. Amerika* [1917] A.C. 38; 33 T.L.R. 135 distinguished.

Decision of Lord Goddard C.J. affirmed.

ACTION.

On July 26, 1952, a tax officer, an established civil servant, who was off duty and for his own purposes was riding a motorcycle, came into collision with a motor-car driven by the defendant. It was admitted that he had been one-third and the defendant two-thirds to blame for the accident. In consequence of the injuries he sustained, the tax officer was absent from his employment until May 18, 1953. During the period of his incapacity he received sick pay from the Inland Revenue Commissioners.

These proceedings were brought by the commissioners on behalf of the Crown pursuant to section 17 (2) of the Crown Proceedings Act, 1947. The action took the form of an action per quod servitium amisit in which the commissioners claimed damages for loss of services due to personal injury of the tax officer, who was, so the commissioners contended, their servant. They alleged that this loss had been caused by the negligent driving of the defendant.

Sir Harry Hylton-Foster Q.C., S.-G., Sir Frank Soskice Q.C., Sir Reginald Hills and *Rodger Winn* for the Inland Revenue Commissioners. The case raises four questions: (1) is an action per quod servitium amisit available to the Crown in respect of the loss of service of a person employed in the public service? (2) If it is, is the action available to the Crown in respect of loss of services of a tax officer? (3) Does it matter that the tax officer in question was negligent quoad the defendant? (4) What is the measure of damages?

With regard to the first question, it is submitted that any remedy which is available to a subject is also, prima facie, available to the Crown. The remedy by way of an action for loss of service is one which is available to the ordinary employer whose servant has been injured by the tortious act of a third person: *Hall* v. *Hollander*.[1] The action is of general application, being available wherever there is a relationship of master and servant: *Lumley* v. *Gye*.[2] It is enough to show that such a relationship exists without proving a binding contract of service: *Evans* v. *Walton*.[3] Accordingly, the Crown should be able to bring this action when there exists a relationship, as between the Crown and the servant, of master and servant. There appears to be no English authority to the effect that the Crown has the right to bring this action, although there are Canadian, Australian and Privy Council decisions with reference to this action: *Rex* v. *Richardson*[4]; *Attorney-General for New South Wales* v. *Perpetual Trustee Co. Ltd.*[5]

The action had its origin in times of serfdom and villeinage, when a master was regarded as having a proprietary interest in his servant, so that an injury to the servant was regarded as a direct injury to the master, who could maintain an action in trespass. When service came to be regarded as a matter of contract, and the old idea of status died out, the action became annexed to contract. It is sufficient, however, to maintain this action to show that de facto services have been rendered: *Evans* v. *Walton*.[6] [*Thompson* v. *Ross*[7] and *Bennett* v. *Allcott*[8] were referred to.] At one time it was thought that the action only lay in relation to a menial servant: *Taylor* v. *Neri*.[9] In *Martinez* v. *Gerber*[10] an extension was made, and it was held that the action lay in respect of a servant who was clearly not a menial servant. The true test, it is submitted, is the existence of a master and servant relationship, and not the grade of servant: *Mankin* v. *Scala Theodrome Co. Ltd.*[11] [*Hart* v. *Aldridge*[12];

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[1] (1825) 4 B. & C. 660.

[2] (1853) 2 E. & B. 216.

[3] (1867) L.R. 2 C.P. 615.

[4] [1948] S.C.R.(Can.) 57.

[5] (1952) 85 C.L.R. 237; [1955] A.C. 457; [1955] 1 All E.R. 846.

[6] L.R. 2 C.P. 615.

[7] (1859) 5 H. & N. 16.

[8] (1787) 2 Term Rep. 166.

[9] (1795) 1 Esp. 386.

[10] (1841) 3 Man. & G. 88.

[11] [1947] 1 K.B. 257; [1946] 2 All E.R. 614.

[12] (1774) 1 Cowp. 54.

Davies v. *Lord Berwick*[13]; *Blake* v. *Lanyon*[14]; *Pilkington* v. *Scott*[15]; *Jones Brothers (Hunstanton) Ltd.* v. *Stevens*[16]; *Woodgate* v. *Knatchbull*[17]; *Alton* v. *Midland Railway Co.*,[18] and *Berringer* v. *Great Eastern Railway Co.*[19] were also referred to.]

It is noteworthy that in *Attorney-General* v. *Valle-Jones*,[20] although the action took the form of a Latin Information, the court did not think it strange that the Crown should bring a claim for loss of service. Indeed, it was accepted in that case that the Crown could claim for the loss of the services of two members of the Royal Air Force. In the Canadian case of *Rex* v. *Richardson*[21] the Supreme Court of Canada held that an action lay at the suit of the Crown for damages for the loss of service of a member of the Canadian armed forces owing to the tortious act of the defendant. By Canadian legislation of 1943 a member of the forces in Canada was deemed to be a servant of the Crown. *Rex* v. *Richardson*[22] shows that once the relationship of master and servant is established the Crown can maintain the action for loss of service.

With regard to the second question—whether the per quod action is available to the Crown in relation to the services of a tax officer—it is submitted that a relationship of master and servant exists as between the Crown and a tax officer. The tax officer was appointed by the commissioners under powers delegated to them by the Crown which empower them to appoint collectors, officers and other persons for collecting, managing and accounting for inland revenue, and in particular income tax, and to exercise control and discipline over persons appointed by them. These powers are enacted in the Inland Revenue Regulation Act, 1890, s. 4 (1) (2) and (3), and in the Income Tax Act, 1952, s. 5 (2) (3) and (4). The tax officer in question was appointed and employed by the commissioners in exercise of these powers. The commissioners are an authorized department for the purposes of the Crown Proceedings Act, 1947, and sue in this action pursuant to section 17 (2) of the Act of 1947.

There is nothing to distinguish the relation of the Crown and a tax officer from an ordinary master and servant relationship. The tax officer has no original authority. He is not the holder of a public office, but performs delegated duties and is completely

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[13] (1861) 3 E. & E. 549.

[14] (1795) 6 Term Rep. 221.

[15] (1846) 15 M. & W. 657.

[16] [1954] 3 W.L.R. 953; [1954] 3 All E.R. 677.

[17] (1787) 2 Term Rep. 148.

[18] (1865) 19 C.B.N.S. 213.

[19] (1879) 4 C.P.D. 163.

[20] [1935] 2 K.B. 209; 51 T.L.R. 239.

[21] [1948] S.C.R.(Can.) 57.

[22] Ibid.

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under the control of his employers; he is appointed, paid and dismissible by them. The services performed by him are such as might well fall under an ordinary contract of service. This is not the case with the members of the armed forces and the police. The authorities show clearly that, apart from the exceptional case of *Rex* v. *Richardson*,[23] members of the armed forces cannot be regarded as servants of the Crown in the sense that a master and servant relationship can be said to exist: *Commonwealth* v. *Quince*.[24] [*Reading* v. *Attorney-General*[25] was also referred to.] Similarly, the police are clearly outside the scope of this relationship: *Attorney-General for New South Wales* v. *Perpetual Trustee Co. Ltd.*[26] [Reference was also made to *Stanbury* v. *Exeter Corporation*[27]; *Enever* v. *The King*[28]; *Fisher* v. *Oldham Corporation*,[29] and *Bradford Corporation* v. *Webster*.[30]]

A tax officer who performs clerical duties and is entirely subordinate to his employers is on an entirely different footing. He cannot be said to have an independent status like a police constable or a member of the armed forces. The tests as to the nature of the work and duties which are employed to determine whether a man is a servant in the strict sense lead one to the conclusion that a tax officer is a servant and the Crown his master.

A question arises whether the fact that a civil servant cannot sue for his pay prevents there being a relationship of master and servant. The Crown has the right, if it thinks fit, to sue a public servant for breach of contract if he leaves without notice: *Reilly* v. *The King*.[31] This is so notwithstanding that a public servant cannot sue for his pay: *Lucas* v. *Lucas and High Commissioner for India*.[32] [*S.S. Raphael* v. *Brandy*,[33] *Mitchell* v. *The Queen*[34] and *Leaman* v. *The King*[35] were also referred to.] The Crown stands in a privileged position in relation to a Crown servant. It may be, as the authorities suggest, that there is an implied term in the contract between the Crown and a civil servant to the effect that the Crown can dismiss at pleasure: *Dunn* v. *The*

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[23] [1948] S.C.R.(Can.) 57.

[24] (1944) 68 C.L.R. 227.

[25] [1951] A.C. 507; [1951] 1 T.L.R. 480; [1951] 1 All E.R. 617.

[26] [1955] A.C. 457; [1955] 1 All E.R. 846.

[27] [1905] 2 K.B. 838; 22 T.L.R. 3.

[28] (1906) 3 C.L.R. 969.

[29] [1930] 2 K.B. 364; 46 T.L.R. 390.

[30] [1920] 2 K.B. 135; 36 T.L.R. 286.

[31] [1934] A.C. 176; 50 T.L.R. 212.

[32] [1943] P. 68; 59 T.L.R. 281.

[33] [1911] A.C. 413; 27 T.L.R. 127.

[34] [1896] 1 Q.B. 121n.; 6 T.L.R. 332.

[35] [1920] 3 K.B. 663; 36 T.L.R. 835.

Queen.[36] [*Gould* v. *Stuart*[37] and *Mitchell* v. *The Queen*[38] were referred to.] If there is such an implied term, it is not inconsistent with the existence of a contract under which the Crown can enforce the obligations of the servant: *Reilly* v. *The King.*[39] The relationship existing between the Crown and a civil servant is one of contract, but the contract is such that it cannot be enforced against the Crown. Whether or not there is a contract between the Crown and a civil servant, the tax officer rendered de facto services. [*Brown* v. *Dagenham Urban District Council*[40] was referred to.] These services provide the basis of a master and servant relationship which existed irrespective of the existence of any contract.

The payments made during the incapacity of the tax officer were wholly reasonable. The Crown had the highest moral obligation, as standing possessed of public funds entrusted to it, to make the payments, since it is responsible for the maintenance of the Civil Service. [*James Finlay & Co. Ltd.* v. *N. V. Kwik Hoo Tong H.M.*[41] and *Bradford Corporation* v. *Webster*[42] were referred to.] Notwithstanding that there was no legal obligation to make the payments, they were reasonable as resulting from the defendant's tort and so are recoverable as damages: *Admiralty Commissioners* v. *S.S. Amerika*[43] and *Attorney-General* v. *Valle-Jones,*[44] *per* MacKinnon J. [*James Finlay* v. *N. V. Kwik Hoo Tong H.M.*[45] was referred to.] The question of damages is dealt with in *Commonwealth* v. *Quince*[46] and in *Rex* v. *Richardson.*[47] [*Attorney-General for New South Wales* v. *Perpetual Trustee Co. Ltd.*[48]; *Brook's Wharf & Bull Wharf Ltd.* v. *Goodman Bros.*[49]; *Metropolitan Police District* (*Receiver*) v. *Tatum,*[50] and *Hall* v. *Hollander*[51] were also referred to.] Although the damages claimed are measured by the amount paid by way of sick pay, that amount is merely a basis of assessment. It is not sought to recover that amount as wages but as damages for loss of service. The services of the tax officer were of value to the Crown and the Crown has suffered loss as a result of being deprived of these services. [*Bradford Corporation* v. *Webster*,[52] *British Transport Commission* v. *Gourley*[53] and *Admiralty Commissioners* v. *S.S. Amerika*[54] were referred to.]

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[36] [1896] 1 Q.B. 116; 12 T.L.R. 101.

[37] [1896] A.C. 575; 12 T.L.R. 595.

[38] [1896] 1 Q.B. 121n.; 6 T.L.R. 332.

[39] [1934] A.C. 176; 50 T.L.R. 212.

[40] [1929] 1 K.B. 737; 45 T.L.R. 284.

[41] [1929] 1 K.B. 400; 45 T.L.R. 149.

[42] [1920] 2 K.B. 135; 36 T.L.R. 286.

[43] [1917] A.C. 38; 33 T.L.R. 135.

[44] [1935] 2 K.B. 209, 220; 51 T.L.R. 239.

[45] [1929] 1 K.B. 400; 45 T.L.R. 149.

[46] (1944) 68 C.L.R. 227.

[47] [1948] S.C.R.(Can.) 57.

[48] [1955] A.C. 457; [1955] 1 All E.R. 846.

[49] [1937] 1 K.B. 534; 53 T.L.R. 126; [1936] 3 All E.R. 696.

[50] [1948] 2 K.B. 68; [1948] 1 All E.R. 612.

[51] (1825) 4 B. & C. 660.

With regard to the third question—as to the effect of the negligence of the tax officer quoad the defendant—it is submitted that the Law Reform (Contributory Negligence) Act, 1945, does not apply. That Act was concerned with the apportionment of liability where a person suffers damage partly as a result of his own fault. The Crown is not at fault. It was deprived of the services of a servant because of the negligence of the defendant and also because of the negligence of the servant. When there are two tortfeasors, and a third person suffers damage by reason of their tort, the third person can proceed against either for the whole damage. This proposition is not affected by consideration as to whether one of the tortfeasors can recover anything from the other. Since the damage suffered by the Crown was due in part to the defendant's action, the Crown is entitled to recover from him the full amount of the damage. [*Mallett* v. *Dunn*[55]; *Drinkwater* v. *Kimber*[56]; *Young and Young* v. *Otto*[57]; *McKittrick* v. *Byers*[58]; *Best* v. *Samuel Fox & Co.*[59]; *Yachuk* v. *Oliver Blais & Co. Ltd.*[60]; *Williams* v. *Holland*,[61] and *Mills* v. *Armstrong*[62] were referred to.]

N. R. Fox-Andrews Q.C. and *Humfrey Edmunds* for the defendant. The tax officer was not employed by the plaintiffs, but was appointed by them, in pursuance of their delegated powers, to a ministerial office under the Crown. There was no contract of service and no relation of master and servant as between the plaintiffs and the tax officer. He chose to accept an engagement in which he agreed to perform certain duties during the pleasure of the Crown, in the course of which he could expect to receive remuneration at a certain rate, and to be granted certain privileges; but he could only receive that remuneration and those privileges at the discretion of the Crown. Section 4

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[52] [1920] 2 K.B. 135; 36 T.L.R. 286.

[53] [1956] A.C. 185; [1955] 3 All E.R. 796.

[54] [1917] A.C. 38; 33 T.L.R. 135.

[55] [1949] 2 K.B. 180; 65 T.L.R. 307; [1949] 1 All E.R. 973.

[56] [1952] 2 Q.B. 281; [1952] 1 T.L.R. 1486; [1951] 2 All E.R. 701.

[57] [1948] 1 D.L.R. 285.

[58] [1926] 1 D.L.R. 342.

[59] [1952] A.C. 716; [1952] 2 T.L.R. 246; [1952] 2 All E.R. 394.

[60] [1949] A.C. 386; 65 T.L.R. 300; [1949] 2 All E.R. 150.

[61] (1833) 6 C. & P. 23.

[62] (1888) 13 App.Cas. 1.

(2) and (3) of the Inland Revenue Regulation Act, 1890, shows plainly that the tax officer's powers are derived from statute and not from the commissioners, who it is alleged employed him.

Although he has no contractual rights the tax officer is in a sense employed by the Crown and so is in a sense a servant of the Crown. But he is a ministerial officer and, therefore, outside the class of servants in respect of whom a master can maintain an action against a third party for loss of services. The tax officer's services are rendered to Her Majesty in her public and not her private capacity, thus the conception of a proprietary right to his services is without basis.

There is no reported case of a petition of right by a civil servant for arrears of pay: see Bell on Crown Proceedings, p. 4. Section 1 of the Crown Proceedings Act, 1947, is purely procedural and, accordingly, if the tax officer had no legally enforceable contractual rights before the passing of that Act, he did not obtain such a right by its subsequent enactment.

In contesting the Crown's claim in the present case strong reliance is placed on certain passages in *Attorney-General for New South Wales* v. *Perpetual Trustee Co. Ltd.*[63] Section 9 of the Workmen's Compensation Act, 1906, shows that the legislature considered it necessary to make provision in order to bring the Crown, in respect of workmen's compensation, into the same position as a private employer. Such a provision would have been otiose if the Crown's contention in the present case were right.

Metropolitan Police District (Receiver) v. *Tatum*[64] is distinguishable. The point taken in the present case was not taken in that case: see the observations of Atkinson J.[65] *Attorney-General* v. *Valle-Jones*[66] cannot assist the Crown, since the question whether the action lay was allowed to go by default and the only question was as to the measure of damages. For the same reason *Bradford Corporation* v. *Webster*[67] is of no assistance to the Crown. In *Rex* v. *Richardson*[68] the court did not have to consider the status of a member of the Canadian forces because by a Canadian statute of 1943 a member of the armed forces was deemed to be a servant of the Crown. The question which is in issue in the present case was therefore never discussed in that case.

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[63] [1955] A.C. 457, 467, 468, 472, 477, 481, 482–483, 485, 487, 490.

[64] [1948] 2 K.B. 68; [1948] 1 All E.R. 612.

[65] [1948] 2 K.B. 68, 72.

[66] [1935] 2 K.B. 209; 51 T.L.R. 239.

[67] [1920] 2 K.B. 135; 36 T.L.R. 286.

[68] [1948] S.C.R. (Can.) 57.

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The payments made to the tax officer were voluntary or discretionary payments which the Crown was under no obligation to make. [*Jones Brothers (Hunstanton) Ltd.* v. *Stevens*[69] was referred to.] There was no legal obligation to make sick payments to the tax officer. The true view is that the negligence of the defendant did not bring about the expenditure incurred by the Crown, since the payments were made voluntarily: *Admiralty Commissioners* v. *S.S. Amerika*, *per* Lord Sumner.[70] [*James Finlay & Co. Ltd.* v. *N. V. Kwik Hoo Tong H.M.*[71] was also referred to.] The Crown has not proved that any damage in fact resulted to it from the negligence of the defendant, and it is essential, in order to establish a claim based on negligence, to prove damage. If there is no damage no action lies.

Civil servants appear to be in the same position as members of the armed forces and cannot maintain a claim for their salaries: *Lucas* v. *Lucas and High Commissioner for India.*[72]

In any event the plaintiffs' claim must be abated in proportion to the agreed degree of contributory negligence. The plaintiffs rely on the existence of a contract of service in claiming damages. It is right, therefore, that they should have their claim reduced, since part of the damage was due to the negligence of their servant. In principle it is wrong to rely on a contract of service and disregard the negligence of the servant. Since the Law Reform (Contributory Negligence) Act, 1945, a father's claim in respect of his child is reduced pro tanto on account of the contributory negligence of the child. A similar reduction should be made in the present case. The negligence of the tax officer must be taken into account if damages are awarded to the plaintiffs. [*McKittrick* v. *Byers*[73]; *Young and Young* v. *Otto*[74]; *Mankin* v. *Scala Theodrome Co. Ltd.*[75]; *Mallett* v. *Dunn*,[76] and *Yachuk* v. *Oliver Blais & Co. Ltd.*[77] were also referred to.]

Sir Harry Hylton-Foster Q.C., S.-G. replied.

March 14. LORD GODDARD C.J. read the following judgment. This is a civil proceeding by the Crown brought on its behalf by the Inland Revenue Commissioners pursuant to section 17 (2) of the Crown Proceedings Act, 1947, claiming damages from the defendant for the loss of the services, due to personal injury, of one R. J. Bryning, a tax officer, which loss they allege was caused by the negligent driving of the defendant.

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[69] [1954] 3 W.L.R. 953; [1954] 3 All E.R. 677.

[70] [1917] A.C. 38, 60; 33 T.L.R. 135.

[71] [1929] 1 K.B. 400; 45 T.L.R. 149.

[72] [1943] P. 68; 59 T.L.R. 281; [1943] 2 All E.R. 110.

[73] [1926] 1 D.L.R. 342.

[74] [1948] 1 D.L.R. 285.

[75] [1947] K.B. 257; [1946] 2 All E.R. 614.

[76] [1949] 2 K.B. 180; 65 T.L.R. 307; [1949] 1 All E.R. 973.

[77] [1949] A.C. 386; 65 T.L.R. 300; [1949] 2 All E.R. 150.

By section 4 of the Inland Revenue Regulation Act, 1890, and section 57 of the Income Tax Act, 1918, the commissioners are empowered to appoint such collectors, officers, and other persons for collecting, receiving, managing and accounting for inland revenue as are not required by law to be appointed by any other authority. Mr. Bryning was first appointed as a temporary clerk in the Inland Revenue Department in January, 1947. On December 2, 1950, he was appointed a tax officer on a provisional basis pending the satisfactory completion of inquiries by the Civil Service Commission, whose duties are prescribed by an Order in Council of July 22, 1920, and finally on June 22, 1951, he was informed that he had been established as a tax officer, his appointment taking effect from January 1, 1950. By the letter of appointment he was informed of the salary he would receive and he was also given a copy of the Treasury Handbook for new Civil Servants from which he could ascertain the rules of the service with regard to sick leave and sick pay.

On July 26, 1952, Mr. Bryning was off duty and for his own purposes was riding a motor-cycle which came into collision with a motor-vehicle driven by the defendant. This action was tried on certain admissions of fact, which were that: (1) the responsibility for the collision was as to two-thirds that of the defendant and as to one-third that of Mr. Bryning. (2) Mr. Bryning was off duty at the time of the collision. (3) Mr. Bryning's injuries were such as to keep him from work from the date of the collision until May 16, 1953. (4) The sum paid to Mr. Bryning in respect of that period was £274 9s. 9d., but for reasons which are not material to this judgment the plaintiffs are only claiming £231 13s. 11d.

The question that falls for decision is whether the Crown are entitled to maintain the action commonly known as "per quod "servitium amisit" in respect of the loss of the services of an established civil servant. There is no direct authority on this point in English law. The only case in which such an action has been brought is *Attorney-General* v. *Valle-Jones*,[1] where the Attorney-General preferred a Latin Information, claiming as damages the wages paid to and the expenses incurred on behalf of two members of the Royal Air Force who had been injured in a motor-car collision caused by the negligence of the defendant. But in that case the defendant conceded that an action for the loss of the services of a servant by the tortious acts of a third party was available to the Crown as an employer as well as to a subject, which is the precise point which is in issue in this case. In the recent case of *Attorney-General for New South Wales* v. *Perpetual Trustee Co. Ltd.*[2] it was held that the action per quod servitium amisit did not lie at the suit of the Government of New South Wales for the loss of the services of a police constable, and while I shall have to deal fully and carefully with the judgment of the Judicial Committee in that case, it differs from the present because of the particular and peculiar position of a police constable, whose duties and authority remove him from the ordinary category of a Crown servant. It therefore becomes necessary to consider the origin and nature of this form of action, and the nature of the employment of an established civil servant.

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[1] [1935] 2 K.B. 209; 51 T.L.R. 239.

This action has often been described as an anomaly, for instance, by Lord Sumner in *Admiralty Commissioners* v. *S.S. Amerika*,[3] where he said: "It appears to be a survival "from the time when service was a status." Villein status gave the lord a proprietary interest in his villeins; by the time of Henry IV a master was regarded, in the old law, as having a like interest in his servant. At any rate, this class of action is referred to in the Year Book of the eleventh year of that king: f. 2, M. 22. In the same way a husband had a proprietary right in his wife which gave rise to actions of crim. con. and for loss of consortium: see *Best* v. *Samuel Fox & Co. Ltd.*,[4] where the authorities are collected. Sir William Holdsworth in his History of English Law, vol. 3, p. 508, tells us that villeinage died a natural death under the Tudor dynasty, and says it so appears from *Pigg* v. *Caley*,[5] the last case in the books which relates to villein status, so it is remarkable that this action survived. But survive it did, and though Eyre C.J. thought that the action was confined to cases of menial, that is, domestic, service (*Taylor* v. *Neri*[6]), by 1841 we find in *Martinez* v. *Gerber*[7] a case in which the loss of service was attributable, as here, to a road collision. So firmly established was the idea of a proprietary right in a servant that it is observable that the action was usually laid in trespass, showing that the infliction of an injury on a servant was regarded as a direct injury to the master. The main question for decision in the last quoted case was whether, if the servant only had an action on the case, the master could bring a per quod action in case, and it was held that he could. It appears from *Ditcham* v. *Bond*[8] that pleaders were accustomed to lay this action and that of crim. con. either in trespass or case. That service de facto though not under a contract was sufficient is clear from the cases relating to the seduction or abduction of a daughter, and it was the opinion of Sir Frederick Pollock, in his standard work on Torts, that the purpose for which alone this class of action may be said to survive is for the punishment of seducers or abductors. It would, however, be impossible to hold that only if there be seduction, or, as in *Evans* v. *Walton*,[9] abduction, that the action can now be maintained, but it is clear that there must be some relationship of master and servant, whether arising out of contract or of domestic circumstances, on which to found the action. Having regard to its nature and origin, I am equally clear that it is not an action that the courts should be acute to extend and I am supported in this opinion by that of the Judicial Committee in the *New South Wales* case[10] cited above and to which I shall refer later in this judgment.

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[2] [1955] A.C. 457; [1955] 1 All E.R. 846.

[3] [1917] A.C. 38, 60; 33 T.L.R. 135.

[4] [1952] A.C. 716; [1952] 2 T.L.R. 246; [1952] 2 All E.R. 394.

[5] (1618) Noy 27.

[6] (1795) 1 Esp. 385.

[7] (1841) 3 Man. & G. 88.

Let me now consider the nature of the employment of an established civil servant. The terms "servant" and "service" are convenient expressions and in common use relating to civil employment under the Crown, but I have to consider the true legal relationship. In Bacon's Abridgment under the sub-title "Prerogative" it is stated that "the King hath an interest in "all his subjects and is entitled to their services and may employ "them in such offices as the public good and the nature of our "constitution require." It was also said, in *Rex* v. *Burnell*,[11] that "every man is a public officer who hath any duty con-"cerning the public, and he is not less a public officer where his "authority is confined to narrow limits, because it is the duty "of his office and the nature of that duty which makes him a "public officer and not the extent of his authority." It is true that this was said in argument for the King in that case, but the quotation has found its way into works of authority such as the late Mr. Stuart Robertson's work on the Civil Proceedings by and against the Crown and, in my opinion, is accurate. I think an established civil servant, whatever his grade, is more properly described as an officer in the civil employment of Her Majesty, and I can see no ground on which different rules of law in respect of his employment can be applied according to the grade or position he may occupy. They apply to a junior clerical officer as they do to a Permanent Secretary; as the Judicial Committee said in the *New South Wales* case,[12] the same rules of law in this respect apply in relation to the armed forces to a Field Marshal as to a private soldier. It is settled beyond controversy that the Sovereign can terminate at pleasure the employment of any person in the public service, except in special cases where it is otherwise provided by law. If authority be needed for what may now be considered as axiomatic, I need only refer to *Shenton* v. *Smith* [13] and *Dunn* v. *The Queen*,[14] but it is curious that there does not appear to be a definite and clear decision as to whether there is a contract of service between the Crown and its officers in the Civil Service. Mr. Stuart Robertson, in the work to which I have already referred, after citing numerous cases and instances of petitions of right that have been presented, though not in all cases tried, says, at page 359: " Even if there " be a contract of service the Crown's absolute powers of dis- " missal must be deemed to be imported into it." Lord Atkin said, in *Reilly* v. *The King*,[15] that " a power to determine a " contract at will is not inconsistent with the existence of a " contract until so determined." Just previously to this passage he said, " their Lordships do not find it necessary to express a " final opinion on the theory accepted in the Exchequer Court "— that is, in Canada—" that the relations between the Crown and " the holder of a public office are in no degree constituted by " contract. They content themselves with remarking that in " some offices at least it is difficult to negative some contractual " relations, whether it be as to salary or terms of employment, " on the one hand, and duty to serve faithfully and with reason- " able care and skill on the other." It is, I think, fair to say that the trend of their Lordships' opinion seems to be that in the absence of some special term, such as engagement for a definitely expressed period, there is not a contractual relationship.

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[8] (1814) 2 M. & S. 436.

[9] (1867) L.R. 2 C.P. 615.

[10] [1955] A.C. 457.

[11] (1699) Carth. 478, 479.

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[12] [1955] A.C. 457, 489.

[13] [1895] A.C. 229.

[14] [1896] 1 Q.B. 116; 12 T.L.R. 101.

[15] [1934] A.C. 176, 180; 50 T.L.R. 212.

The Solicitor-General contended that in these cases there is a contract, though it is one which cannot be enforced against the Crown, so that not only can no action lie for wrongful dismissal, but no action, or formerly no petition of right, could be brought for salary earned but not paid. This contention, if correct, would, I think, be enough, without more, to show the vast difference between the relationship of the Crown and its officers and the ordinary relation of master and servant. But, while it is clear that no action for wrongful dismissal can be brought by a discharged civil servant, I may be allowed to say that I adhere to the opinion I expressed in *Terrell* v. *Secretary of State for the Colonies* [16] that he could recover his salary for the time he has served. He would claim on a quantum meruit, and I am, I think, fortified in this view by *Reilly* v. *The King*,[17] by *Reg.* v. *Doutre*,[18] and by *Bushe's* case,[19] referred to in Mr. Robertson's book at page 338. It may well be that there is a difference in this respect between pay due to a civil servant and to a soldier, whether private or officer. That a soldier cannot recover pay by action was laid down in *Mitchell* v. *The Queen* (1890),[20] and followed by Acton J. in *Leaman* v. *The King*,[21] but the reason for this rule will be found in the judgment of Tindal C.J. in *Gibson* v. *East India Co.*[22] If I may be bold enough to express a conclusion on a matter on which the Judicial Committee hesitated in *Reilly's* case,[23] it is that an established civil servant is appointed to an office and is a public officer, remunerated by moneys provided by Parliament, so that his employment depends not on a contract with the Crown but on appointment by the Crown, though there may be, as indicated in *Reilly's* case,[23] exceptional cases, as, for instance, an engagement for a definite period, where there is a contractual element in or collateral to his employment.

But the Solicitor-General contends that it is unnecessary, to support this class of action, to show that service is rendered under a contract. De facto service, he contends, is enough. I agree that the cases support this, though I believe that those that do are all concerned with service of a menial, that is, domestic, character such as that of a daughter or female servant who has been seduced or of a son enticed away from working for his father. Even these all depend upon there being some, though it may be almost fictitious, relation of master and servant. On this matter I am fortunate in having the guidance of the Judicial Committee in the *New South Wales* case,[24] and I would refer in particular to the concluding paragraphs of the judgment beginning with the penultimate paragraph.[25] As I said above, it is true that the case was concerned with the service of a police constable, whose common law duties relating to independent action distinguish him from other servants of the Crown, but if the master and servant relation upon which the action per quod servitium amisit rests is wholly different in kind not only from the relation of the Crown and a constable, but from that of the Crown and a serving soldier, so also do I think it is different from that of the Crown and an established civil servant, whose duties are of a public nature and in part at least laid down by statute.

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[16] [1953] 2 Q.B. 482, 499; [1953] 2 All E.R. 490.

[17] [1934] A.C. 176.

[18] (1884) 9 App.Cas. 745.

[19] (1590) Cro.Eliz. 188.

[20] [1896] 1 Q.B. 121n.; 6 T.L.R. 332.

[21] [1920] 3 K.B. 663; 36 T.L.R. 835.

[22] (1839) 5 Bing.N.C. 262, 274.

[23] [1934] A.C. 176.

Even if I am wrong in the opinion I have expressed above that the relationship is not contractual, a contract which gives no remedy to the employee against his employer for its breach is wholly different in kind from those which have hitherto supported the action. As I am myself a member of the Judicial Committee it is not, I hope, impertinent for me to say how wholly I agree with their opinion[26] that this "action should not be extended "beyond the limits to which it has been carried by binding "authority or at least by authority long recognized as stating "the law."

But there is another point raised by the defence with which I ought to deal. It is conceded that the payment of sick pay is a voluntary act in the discretion of the Crown. Apart from the other matters with which I have dealt, it is contended that this forms a complete answer to the plaintiffs' claim in that the Crown cannot recover as damages what they have paid as a bounty. To that the Solicitor-General's answer was that I should apply the reasoning of MacKinnon J. on this matter in *Attorney-General* v. *Valle-Jones*,[27] and also that the claim was not for the sick pay itself, but for compensation for loss of service which might be measured by that payment. On this second and somewhat subtle contention I say that this is an action on the case in which damage is an essential ingredient: see *Martinez* v. *Gerber*.[28] If the damage alleged to have been suffered consists of the payment out of money which is in fact no more than a gift or bounty, that, in my opinion, cannot amount to damage in law. It has not been caused by the wrongful act because the Crown was pleased to extend its bounty to the injured man. I had no evidence that any actual damage was caused to the Department by being deprived of the services of a trained man or that they in fact incurred any expense in training or engaging someone else to take his place. But it was said that in the *Valle-Jones* case [29] MacKinnon J. applied the simple test of whether it was reasonable for the Crown to have made the payments. With all the respect that I always pay to that learned judge's opinions, I am unable to understand the view he formed with regard to Lord Sumner's speech in *Admiralty Commissioners* v. *S.S. Amerika.*[30] It is true that that case was dealing with the question whether the death of a human being could be relied on as forming a cause of action, but, as the headnote accurately shows, there was also the question whether pensions which were voluntary payments, as is the sick pay in the present case, could form the subject of a claim for damages. That the noble and learned Lord throughout his speech also had these per quod actions for loss of service in mind, is clear from the opening words of the new paragraph on page 53, and also from the first paragraph on page 60. The concluding paragraph of his speech begins "My Lords, apart from the question of civil liability for the "death of a human being, there is another aspect of this case" and then he discusses whether, as I read it, in any action of tort a voluntary ex gratia payment to a third party can be the subject of a claim for damages. His decision that it cannot appears both clear and emphatic. I accordingly think that MacKinnon J.'s judgment on this point cannot be supported. On this ground also the action fails.

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[24] [1955] A.C. 457.

[25] Ibid. 489.

[26] Ibid. 490.

[27] [1935] 2 K.B. 209.

[28] 3 Man. & G. 88.

Before parting with the case, I hope I shall not be regarded as going beyond my province if I add a word, as this action was said to be brought to test the question whether, in such cases as these, the loss ought to fall on the taxpayer. There is, as it seems to me, a perfectly simple way of protecting that much harassed class. Those of us who have to try these personal injury cases know quite well how often it happens that a considerate employer, relative, or some kindly disposed friend gives an injured man a sum equivalent to his wages during incapacity on the terms that if he recovers his loss of wages as part of his special damage in an action he should repay what is advanced to him. Sometimes, too, I have known a loan to enable an injured man to go away for convalescence or to receive some special treatment which he could not afford from his own resources. I have never known these items when claimed as special damage to be disallowed, provided they were reasonable, because the injured man had to seek assistance such as I have described to enable him to obtain the benefits and which he would have to repay. There may be some ground of high policy of which I am unaware, which would prevent a department from giving sick pay to an injured member of its staff on the terms that it was to be repaid if he recovered what he would have earned but for the accident as special damage. I cannot think that there is. If this were done, the taxpayer would be adequately protected.

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[29] [1935] 2 K.B. 209.

[30] [1917] A.C. 38.

One other consideration should not be overlooked. Under modern legislation an injured man, if he is in part to blame, will only be entitled to recover a proportion of his damage. The Solicitor-General boldly argued that the Department was entitled to recover the whole of a man's wages as the measure of compensation although were the latter the plaintiff he could only, on the admitted facts of this case, make the defendant liable for two-thirds. I do not propose to decide whether this argument is sound or not for it has become unnecessary to do so, but if it is, it would, in my opinion, not only be an injustice to the defendant, but would add another to the many anomalies which surround this class of action.

I ought perhaps to add this, to show that I have not overlooked the second submission made by the defendant. If a per quod action would lie, it could, in my opinion, make no difference that the infliction of the injury which caused the loss of service happened when the servant was off duty. So long as the service was in existence that is enough. Were it otherwise, there would, I think, have been a short and simple answer in most of the seduction cases. There must be judgment for the defendant with costs.

Judgment for the defendant.

The Crown appealed.

[Reported by D. TRAFFORD OWEN, Esq., Barrister-at-Law.]

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INLAND REVENUE COMMISSIONERS v. HAMBROOK.

[The principal arguments of counsel were similar to those before Lord Goddard C.J. (supra) and the following notes accordingly record only additional citations from and comment on the cases.]

Sir Harry Hylton-Foster Q.C., S.-G., Sir Frank Soskice Q.C., Sir Reginald Hills and *Rodger Winn* for the commissioners. The only English case which appears to support the suggestion that the Crown, unlike the subject, has no remedy by way of action per quod servitium amisit is *Rex* v. *Burnell*,[1] but as that is clearly a report of the argument only and not the judgment of the court it cannot be relied on against the Crown.

If the decision of Lord Goddard C.J. stands it will relieve a wrongdoer of part of his liability. As against his decision that in this form of action damage is an essential ingredient and that the Crown has not proved any damage, the dictum of Lord Halsbury in *Owners of Steamship Mediana* v. *Owners, Master and Crew of Lightship Comet; The Mediana*,[2] that where by the wrongful act of one man something belonging to another is injured or taken away that of itself is a ground for damages, is prayed in aid. Moreover, the Crown is entitled to recover from the defendant the payments of sick pay, despite the fact that they were voluntary payments in the discretion of the Crown, for what the Crown as plaintiff has to do by way of remedial measures is something which flows from the defendant's tort. *Admiralty Commissioners* v. *S.S. Amerika* [3] is distinguishable on this point, for the payment of a pension to the dependants of the drowned men in that case could never be regarded as a remedial measure in relation to the loss of their services; sick pay is quite different.

Again, the contributory negligence of this tax officer while off duty does not affect the measure of damages recoverable, for the damage here claimed is collateral and not consequential. The Crown is not standing in anyone else's shoes but is pursuing an independent action of its own. *Mallett* v. *Dunn* [4] completely covers this aspect of this case.

[DENNING L.J. It does not seem right that in that case the husband could recover the wife's expenses with no reduction, though if the wife herself had sued she could not recover them.]

[PARKER L.J. It does not seem right; but the employer's claim in this form of action does not rest on subjugation in any way. It is a completely separate cause of action, for which wages happen to be the form of remedy.]

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[1] (1699) Carth. 478.

[2] [1900] A.C. 113, 116; 16 T.L.R. 194.

[3] [1917] A.C. 38; 33 T.L.R. 135.

[4] [1949] 2 K.B. 180; 65 T.L.R. 307; [1949] 1 All E.R. 973.

N. R. Fox-Andrews Q.C. and *Humfrey Edmunds* for the defendant Hambrook. The Crown is here seeking to extend the availability of the action per quod to circumstances in which it has never before applied. This action is restricted to the class of servant described by Blackstone (Commentaries, Vol. I, p. 425 et seq. on Master and Servant) as " menial servants," meaning thereby not servants of a lower social stratum but servants " intra " moenia "—domestic servants; and its scope should not be extended beyond that class to the completely different relationship between this tax officer and the Crown. The evidence before Lord Goddard C.J., which showed that the tax officer was far from being merely a superior office boy, cannot be disregarded. *Martinez* v. *Gerber* [5] was, it is submitted, an impermissible extension of the action to the case of a traveller.

There is no valid precedent for an action by or on behalf of the Crown for the loss of services of a servant of the Crown. The point was not argued in *Attorney-General* v. *Valle-Jones*,[6] which was in any event wrongly decided. *Metropolitan Police District (Receiver)* v. *Tatum* [7] and *Receiver for the Metropolitan Police District* v. *Croydon Corporation* [8]—in which Slade J. followed *Tatum's* case [9]—were also, it is submitted, wrongly decided; for, as Lynskey J. correctly held in *Monmouthshire County Council* v. *Smith*,[10] the receiver was not legally compellable to pay wages to the injured policeman, and therefore the defendant was not liable for damages to the receiver but only to the policeman himself, the rate of wages being no more than evidence of the damage suffered. [*Nowlan* v. *Ablett* [11] and *Nicoll* v. *Greaves* [12] were also referred to for instances of persons treated as " menial " servants " in the nineteenth century.]

Hylton-Foster Q.C., S.-G., in reply, referred to the observation of Alderson B. in *Eager* v. *Grimwood* [13] that the plaintiff (in an action per quod) has " only a right to her " (the servant's) " service and not a kind of property in her."

Cur. adv. vult.

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[5] (1841) 3 Man. & G. 88.

[6] [1935] 2 K.B. 209; 51 T.L.R. 239.

[7] [1948] 2 K.B. 68; [1948] 1 All E.R. 612.

[8] [1956] 1 W.L.R. 1113; [1956] 2 All E.R. 785.

[9] [1948] 2 K.B. 68.

[10] [1956] 1 W.L.R. 1132; [1956] 2 All E.R. 800.

[11] (1835) 2 C.M. & R. 54.

[12] (1864) 17 C.B.N.S. 27.

[13] (1847) 1 Ex. 61, 63.

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INLAND REVENUE COMMISSIONERS
v.
HAMBROOK.

July 30. DENNING L.J. The Commissioners of Inland Revenue, acting on behalf of the Crown, bring this action for the loss of services of Mr. Bryning. He was a tax officer and on July 26, 1952, when he was off duty, he was riding a motor-cycle and came into collision with a motor-car driven by the defendant Hambrook. He was one-third to blame and Hambrook two-thirds to blame. He was injured and off work for nearly 10 months. The Crown paid him full pay for six months and half-pay for four months, and now claim that sum (less national insurance benefit) as damages in an action per quod servitium amisit.

An action by a master for loss of services is, as Lord Sumner said, a survival from the time when service was a status. It is an anomaly, because it does not fit in with the principles of law as now understood. It treats a servant as a chattel belonging to his master. If a ship or a car is damaged in a collision by the negligence of someone else, the owner of it can recover damages for the loss of use of it while it is being repaired. The action per quod servitium amisit enables a master to do the same if his servant is injured. No one else, except a wife, is treated in this way. If a director of a company or a partner in a firm is injured in an accident, he alone can sue for damages. The company or firm cannot sue for loss of his services. If a master himself is injured, his servants may be thrown out of employment, but they cannot sue for their loss. If a solicitor is injured, his clients may be much prejudiced by his absence from his work, but they have no claim for damages on that account. The general principle of law is, as Lord Parker stated in *Admiralty Commissioners* v. *S.S. Amerika,*[1] that "the loss of A arising out of an "injury whereby B is unable to perform his contract is not "actionable."

Another anomaly is disclosed by the facts of the present case. If the commissioners can recover damages for loss of Mr. Bryning's services, they would be entitled to the full amount without any reduction at all, despite the fact that he was one-third to blame. This is, indeed, the logical result of treating Mr. Bryning as a chattel. If the owner of a motor-car sends it out with a driver and, while he is driving in the course of his employment, the car is damaged in a collision by the faults of both drivers, the owner must take responsibility for his own driver's negligence. He only gets reduced damages. But if the driver takes the car out "on a frolic of his own," outside the course of his employment, the owner recovers full damages for the car because he is not then responsible for the driver's negligence. So here, when Mr. Bryning is off duty, the commissioners, if their claim is good, can treat him as their chattel and claim full damages for the loss of his services, although it was partly his own fault.

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[1] [1917] A.C. 38, 45; 33 T.L.R. 135.

I need hardly say that, in the face of these anomalies, this sort of action should not be extended. This was emphasized by the Privy Council in the recent case of *Attorney-General for New South Wales* v. *Perpetual Trustee Co. Ltd.*[2] The question for us is whether the present claim is an extension or not. To answer this it is necessary to inquire the bounds of the action. This can only be done by tracing its development throughout the centuries.

In the Middle Ages, servants were regarded as property belonging to the master. If another man took them away, he could be sued in trespass just as if he took cattle. This way of looking at them is best shown by the old writs collected from the Year Books by Fitzherbert J., who lived early in the sixteenth century. One writ describes how a lord of the manor put his villein in the stocks because he had disobeyed orders. Another man broke up the stocks and let the villein out. It was held that the lord of the manor had an action of trespass against the one who set the villein free. Another writ describes how the abbot of a monastery put a friar in a cell so that he could be chastised because he broke a rule of the order. A friend of the friar got into the monastery and let him out. It was held that the abbot had an action of trespass against the one who set the friar free. So also it was held, quite generally, that "a man "shall have an action of trespass for taking of his apprentice or "for taking of his servant": see Fitzherbert's Natura Brevium, p. 91.

In such a state of society it was natural to give a master a cause of action against anyone who beat his servants. A good instance is where a man, by charter from the King, had a right to take a toll on all things sold in a fair in the town. He sent his servants to collect the toll, but they were set upon and beaten. It was held that he had a general action of trespass for assault on his servants and for the loss of their services. The servant himself had a cause of action as well as the master. The distinction between them was laid down as early as 1441, when it was held that "the master recovers his damages for the "loss of the services and the servant for the damage done to "his person": see the Year Book of 19 Henry VI, pl. 94.

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[2] [1955] A.C. 457; [1955] 1 All E.R. 846.

So much for the general state of the law in those days. But the question may be asked: "Did the King have such an "action?" There is no reason why he should not have it, and there are many indications that he did. Fitzherbert gives instances of actions by the King for trespass for taking goods and also for entering on land, cutting the trees and depasturizing the herbage. The practice, he says, "is to have an information "for the King in the Exchequer and the defendant there to "answer it." So far as trespass per quod servitium amisit is concerned, he gives an instance where one W and his men, land and goods, were granted protection by the King: then another man, B, with force and arms took and carried away the goods of W and his men. It was held that the King had a special action of trespass against B: see Fitzherbert's Natura Brevium, p. 92.

When we come to the seventeenth century, we find this medieval law continued. In 1612, Lord Coke, in *Robert Marys'* case,[3] stated it in this way: "if my servant is beat, the master "shall not have an action for this battery, unless the battery is "so great that by reason thereof he loses the service of his "servant, but the servant himself for every small battery shall "have an action; and the reason for the difference is, that the "master has not any damage by the personal beating of his "servant, but by reason of a *per quod, viz. per quod servitium,* "*&c., amisit*; so that the original act is not the cause of his "action, but the consequent upon it, viz., the loss of his service "is the cause of his action; for be the battery greater or less, if "the master doth not lose the service of his servant, he shall "not have an action." To that statement of the law, there needs only to be added the commentary by Sir Matthew Hale, 50 years later: "Trespass for beating his servant, *per quod* "*servitium amisit*, lies although he was not retained, but served "only at will," citing a case of 1410: see Fitzherbert's Natura Brevium at p. 91, note.

The eighteenth century sees an important development. We find that the action per quod has become confined to menial servants and apprentices, those who lived in the household as part of the family, for the very good reason that they alone could then be considered as the property of the master. The reason for the law only applied to them and the cause of action should therefore only be given in respect of them. This appears from the observations of Sir William Blackstone (in the first volume of his Commentaries, I, pp. 425 and onwards). He divides servants into four categories. "The first sort of servants therefore, acknowledged by the laws of England, are *menial servants*; "so called from being *intra moenia*, or domestics. The contract "between them and their masters arises upon the hiring. If the "hiring be general without any particular time limited, the law "construes it to be a hiring for a year; upon the principle of "natural equity, that the servant shall serve, and the master "maintain him, throughout all the revolutions of the respective "seasons; as well when there is work to be done, as when there "is not. . . . Another species of servants are called *apprentices*. . . . A third species of servants are *labourers*—who are "only hired by the day or the week, and do not live *intra* "*moenia*, as part of the family. . . . There is yet a fourth "species of servants, if they may be so called, being rather in "a superior, or ministerial, capacity; such as *stewards*, *factors*, "and *bailiffs*: whom however the law considers as servants "*pro tempore*, with regard to such of their acts, as affect their "master's or employer's property." Sir William Blackstone (at p. 429), after discussing a master's action for inducing a servant to leave, said: "The reason and foundation upon which "all this doctrine is built, seem to be the property that every "man has in the service of his domestics; acquired by the "contract of hiring and purchased by giving them wages." By "domestics" Sir William Blackstone clearly meant the menial servants described by him in his first category. He seems to have considered a master to have a property in his menial servants, but not in others.

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[3] (1612) 9 Co.Rep. 111b, 113a.

That this was the general opinion of the time appears from *Taylor* v. *Neri*.[4] It was sought there to extend the action per quod servitium amisit to the case of a singer hired to sing. Eyre C.J., Chief Justice of the Common Pleas, a most respected and experienced judge, refused to admit it. He said that he did not think the court had ever gone further than the case of a menial servant.[5] The precedents of that time show that the declaration in seduction cases described the daughter as a "menial servant": see *Bennett* v. *Allcott*.[6]

[4] (1795) 1 Esp. 385.

[5] Ibid. 386.

[6] (1787) 2 Term Rep. 166.

We may take it, therefore, that at the close of the eighteenth century the action was confined to the members of the household who rendered services to the head of it and who had to be kept by him in sickness and in health—sons, daughters, apprentices, and so forth—for in them alone was there a resemblance of property. It was quite reasonable that the master, who had to keep them while sick, should have a cause of action for loss of their services.

In the nineteenth century the action survived mostly to avenge the seduction of a daughter—a special category which stands by itself and on which I do not pause. There are few other cases. In 1840, a watchmaker recovered damages for loss of services of his apprentice: *Hodsoll* v. *Stallebrass.*[7] The apprentice lived in as one of the family, as many did in those days. Perhaps he slept under the counter.

Then in 1841 came *Martinez* v. *Gerber*,[8] which looks at first sight as if it was an extension. A master was allowed an action for loss of services for his "servant and traveller." No point was taken that the action did not extend to him. There is nothing to show, in any of the reports of the case, whether he lived in or not. At that time many servants did live in the master's house as members of the household. I think we should assume that that was the case, else it would be an illegitimate extension of the law as it was understood by Eyre C.J.

There is no other case worthy of notice in the nineteenth century, but I would remark that towards the close of the century Sir Frederick Pollock, who was well versed in the history of the law and in particular of this cause of action, makes it clear that in his view it is confined to members of the household. In the first edition of his book on Torts, published in 1887, he said (at p. 194): "It seems natural enough that an action should lie at "the suit of the head of a household for enticing away a person "who is under his lawful authority, be it wife, child or servant: "there may be a difficulty in fixing the boundary where the "sphere of domestic relation ends and that of pure contract "begins, but that is a difficulty of degree. That the same rule "should extend to any wrong done to a wife, child or servant, "and follow as a proximate consequence by loss of their society "or service is equally to be expected." It is to be noted that in that passage and in its setting in the book, Pollock confines the action to the head of the household in respect of injuries in family relations. The passage has remained unchanged in every edition from that time to this.

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[7] (1840) 11 Ad. & El. 301.

[8] (1841) 3 Man. & G. 88.

The twentieth century opens with *Admiralty Commissioners* v. *S.S. Amerika*,[9] arising out of circumstances in which naval men had been drowned when a submarine was sunk by the negligence of a wrongdoer. The Commissioners of Admiralty sued to recover the pensions payable to their families, but failed because of the principle actio personalis moritur cum persona: but Lord Parker and Lord Sumner [10] emphasized the anomalous nature of the action per quod servitium amisit. Then in 1935 came *Attorney-General* v. *Valle-Jones*,[11] where two aircraftsmen were injured as a result of a collision with a motor-lorry, whereby the Crown lost their services; and in 1947 came *Mankin* v. *Scala Theodrome Co. Ltd.*,[12] where a theatrical performer was injured and his employer sued for loss of services. In those two cases the employer succeeded; but it must be noted that in neither case was it contended that the action did not lie. The only contest was on damages. It seems that the limitations on this action had been forgotten. It was the courts of Australia which brought them to light in a series of important judgments marked by much historical research. In 1944 the High Court of Australia declined to allow an action by the Crown for loss of services of an airman (see *Commonwealth* v. *Quince* [13]); and in 1952 the same court declined to admit it for loss of services of a police constable: see *Attorney-General for New South Wales* v. *Perpetual Trustee Co. Ltd.*[14] These decisions have been upheld by the Privy Council.[15] *Attorney-General* v. *Valle-Jones* [16] must, therefore, be taken to have been wrongly decided. The Crown cannot sue for loss of services of a member of the armed forces. I can see no sensible distinction in this regard between a civil servant and a soldier or sailor or airman.

The opinion of the Board in the *Perpetual Trustee* case,[17] delivered by Viscount Simonds, contains many significant passages, of which I would just quote one [18]: "The form of "action appears, as Lord Sumner said, to be a survival from the "time when service was a status. That status lay in the realm "of domestic relations. It would not, in their Lordships' view,

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[9] [1917] A.C. 38; 33 T.L.R. 135.
[10] [1917] A.C. 38, 45, 60.
[11] [1935] 2 K.B. 209; 51 T.L.R. 239.
[12] [1947] K.B. 257; [1946] 2 All E.R. 614.
[13] (1944) 68 C.L.R. 227.
[14] (1952) 85 C.L.R. 237.
[15] [1955] A.C. 457.
[16] [1935] 2 K.B. 209.
[17] [1955] A.C. 457.
[18] Ibid. 490.

"be in accord with modern notions or with the realities of "human relationships today to extend the action."

Now, having traced the history of this action, I think it should be confined today (as it was in the eighteenth century) to the realm of domestic relations where a member of the master's household is injured: for that is the only realm to which it can in reason be applied. It does not lie, therefore, at the instance of governments, limited companies, or other employers who keep no household.

Much of the argument before us proceeded on other lines. It was said by Mr. Fox-Andrews that the action did not lie for the Crown because there was no contract of service between the Crown and its servants, or because it had power to dismiss them at will. Those particular arguments did not appeal to me. I think that it is quite plain from the old cases that the Crown is not debarred from bringing the action simply because it is the Crown, nor because there is no contract of service between itself and its servants, nor because it can dismiss its servants at will. If the action did lie generally, wherever the relationship of master and servant existed, I would agree that there are many cases where the Crown could sue. As Sir Owen Dixon, the Chief Justice of Australia, has said: "There always have been "employments under the Crown where the command and direc- "tion of the Crown given mediately or immediately, is the sole "measure of duty of the servant. When the right of control "exists in the Crown and extends to the manner in which the "employment is carried out, that is, to the doing of the work, "the test of the relation of master and servant is satisfied": see *Attorney-General for New South Wales* v. *Perpetual Trustee Co. Ltd.*[19]

But, in my opinion, the action does not lie whenever the relationship of master and servant exists. It only lies when the servant can properly be regarded as a member of the master's household, that is, as part of the family. A servant has long since ceased to be regarded as a slave. It is time he ceased to be looked upon as a chattel. He should be looked upon as a free human being, and not less so when he is a civil servant.

Such is the broad ground on which I would dismiss this appeal; but I would also add that there is a narrower ground on which also I would dismiss it. Mr. Bryning was a tax officer appointed under statute with sufficient discretion to take him out of the category of a servant to whom this cause of action applies.

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[19] 85 C.L.R. 237, 249.

Supposing the action did lie, a question would arise as to damages. We all know that in the many cases where servants employed by private employers are injured the servants themselves claim for loss of earnings. In the ordinary way, when a servant is employed at a weekly wage he is only entitled to wages when he is working and to nothing when he is away sick, except national insurance benefit: see *O'Grady* v. *M. Saper Ltd.*[20] So he claims for loss of wages. If the employer should pay his wages while sick, it would be a voluntary payment and not recoverable by the employer. As Lord Parker said in the *S.S. Amerika*[21]: "No person aggrieved by an injury is by "common law entitled to increase his claim for damage by any "voluntary act." The payment by the Crown of sick pay is a voluntary act and is not recoverable as such. But I see no reason why it should not be used as some evidence of the value of his services. Indeed, the Supreme Court of Canada so held in *Rex* v. *Richardson.*[22] I say no more about it because, in the view I take of this case, it does not arise. I would dismiss the appeal on the broad ground that the action per quod servitium amisit does not lie in respect of a person in the situation of Mr. Bryning.

Birkett L.J. I agree with the judgment which has just been delivered and for the reasons my Lord has given. The facts on which the Crown relied, in seeking to recover from the defendant the sums of money the Commissioners of Inland Revenue had paid to their established clerk in the circumstances of this case, have been fully set out by my Lord, and it is not necessary to repeat them. The nature of the action was discussed at length in the judgment of Lord Goddard C.J.,[23] and has been dealt with by my Lord today. The history of the form of action with which we are now concerned has been described in many cases, most notably in *Attorney-General for New South Wales* v. *Perpetual Trustee Co. Ltd.*[24] and in *Commonwealth* v. *Quince*[25]; and in the judgment to which we have just listened that history has been further illuminated by the references to the many authorities my Lord has made. All that is left for me to do, therefore, is to state my conclusions as briefly as possible.

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[20] [1940] 2 K.B. 469; 56 T.L.R. 913; [1940] 3 All E.R. 527.

[21] [1917] A.C. 38, 42.

[22] [1948] S.C.R. 57.

[23] Ante, p. 649.

[24] 85 C.L.R. 237; [1955] A.C. 457, 490.

[25] 68 C.L.R. 227.

We are concerned in this appeal with the position of Mr. Bryning only, but the arguments have necessarily included some larger issues. Evidence was given before Lord Goddard C.J. relating to Mr. Bryning, and the Lord Chief Justice came to the conclusion that Mr. Bryning was an established civil servant. He then considered the nature of the employment of an established civil servant in some detail, particularly with regard to the services rendered, and all the terms and conditions relating to and governing the services. He called particular attention to the passage in the judgment of the Judicial Committee of the Privy Council in the *Perpetual Trustee* case which reads[26]: "Their Lordships can now express their final opinion upon the "case. They repeat that in their view there is a fundamental "difference between the domestic relation of servant and "master and that of the holder of a public office and the State "which he is said to serve," and the Lord Chief Justice then continued[27]: "As I said above, it is true that the case was "concerned with the service of a police constable, whose common "law duties relating to independent action distinguish him from "other servants of the Crown, but if the master and servant "relation upon which the action per quod servitium amisit rests "is wholly different in kind not only from the relation of the "Crown and a constable, but from that of the Crown and a "serving soldier, so also do I think it is different from that of "the Crown and an established civil servant, whose duties are "of a public nature and in part at least laid down by statute." That would appear to be the essential part of the decision of the Lord Chief Justice. Mr. Fox-Andrews had submitted that Mr. Bryning was a ministerial officer under the Crown, and quite outside any class of servants in respect of whom the master can maintain an action against a third party for the loss of the servant's services.

A further submission he made was that in this case there was a complete absence of any proprietary right arising out of status, and he submitted that the law was that some such right was essential to found and maintain the action.

In my opinion, as the judgment of the Lord Chief Justice indicates in the passage I have cited, it is the history of this form of action that is fatal to the Crown's case in this appeal.

The Solicitor-General argued that as Mr. Bryning always acted under orders, and possessed no original authority, the services he rendered allowed the Crown to sue in this form of action. I do not think it possible for the Crown to succeed in this action by seeking to put Mr. Bryning into some special category of civil servant, for the reason that whatever the category may be found to be, there is one essential condition to be fulfilled first of all—he must be within the class to which the authorities have said that the action alone applies. In *Attorney-General for New South Wales* v. *Perpetual Trustee Co. Ltd.*[28] Lord Simonds said: "The form of action appears, as Lord Sumner said, to be "a survival from the time when service was a status. That "status lay in the realm of domestic relations."

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[26] [1955] A.C. 457, 489.

[27] Ante, p. 655.

My Lord, in his judgment today, has referred to the origin of the form of action, and its history through the centuries, and it is quite clear, I think, that the action arose out of status. The feudal lord, for example, had a proprietary interest in his villein, and whoever injured the villein injured the lord. The quotations from Blackstone support the same general view that the action was in respect of servants who were within the domestic sphere and where the proprietary element was present. In *Best* v. *Samuel Fox & Co. Ltd.*,[29] where the form of the action was discussed in another connexion, it was said to be an anomaly which ought to be restricted rather than extended. To permit the Crown to sue in the case of an officer such as Mr. Bryning would, in my view, be to extend the scope of the action, and I agree with the Lord Chief Justice that it ought not to, and indeed cannot, be done.

A further argument was submitted by Mr. Fox-Andrews on the question of damages. The sums of money paid to Mr. Bryning were in fact payments in respect of sick pay, and they were sums which the commissioners were not obliged to pay, but which were in truth voluntary payments. They could not, therefore, be recovered against this defendant. The Solicitor-General replied that these payments were to be regarded as a good conventional measure of the damages suffered by the commissioners in the loss of Mr. Bryning's services, and could therefore be recovered as damages. Sir Frank Soskice submitted that although Mr. Bryning was found to be in part responsible for the accident in which he was injured because of his negligence, that was no reason why the Crown should not recover all the damage suffered and there should be no abatement because of the contributory negligence.

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[28] [1955] A.C. 457, 490.

[29] [1952] A.C. 716; [1952] 2 T.L.R. 246; [1952] 2 All E.R. 394.

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Birkett L.J.

In view of the decision that the action will not lie, no decision on the question of damages is necessary. The Solicitor-General called our attention to *Admiralty Commissioners* v. *S.S. Amerika*[30] and *Rex* v. *Richardson*,[31] and it may very well be that the amounts of money paid out as sick pay may be recoverable on the ground he submitted; and, further, that the full amount might be recoverable despite the contributory negligence of Mr. Bryning. Lord Goddard C.J., after stating the position with regard to damages, said[32]: "The Solicitor-General boldly "argued that the Department was entitled to recover the whole "of a man's wages as the measure of compensation although "were the latter the plaintiff he could only, on the admitted facts "of this case, make the defendant liable for two-thirds. I do "not propose to decide whether this argument is sound or not "for it has become unnecessary to do so, but if it is, it would, "in my opinion, not only be an injustice to the defendant, but "would add another to the many anomalies which surround this "class of action." I propose to leave the question of the damages in the same way, and would dismiss this appeal on the ground that this form of action is not open to the Crown in the case of Mr. Bryning.

PARKER L.J. I have come to the same conclusion, and as I agree entirely with the reasons given by both my Lords, I have very little that I desire to add. So far as Mr. Bryning is concerned, he was an established civil servant, and I agree entirely with Lord Goddard C.J. when he says[33]: "I think an established "civil servant, whatever his grade, is more properly described as "an officer in the civil employment of Her Majesty, and I can "see no ground on which different rules of law in respect of his "employment can be applied according to the grade or position "he may occupy. They apply to a junior clerical officer as they "do to a Permanent Secretary; as the Judicial Committee said "in the *New South Wales* case,[34] the same rules of law in this "respect apply in relation to the armed forces to a Field Marshal "as to a private soldier."

That is enough to dispose of this case, but having regard to the arguments addressed to this court, I think it is right to consider the matter on a wider basis. Thus the Solicitor-General, while conceding that the more senior civil servants could properly be described as "officers in the civil employment of Her "Majesty," contended that the rest were servants in respect of whom an action per quod servitium amisit would lie. It was, he said, a question of degree depending in each case on the so-called "servant's" duties and authority, and he contended that Mr. Bryning fell within the latter category. Mr. Fox-Andrews, on the other hand, not only contended that Mr. Bryning's duties and authority were such as to bring him within the former category, but further contended that a per quod action would not lie in respect of *any* servant of the Crown, and this by reason of the fact that there was in general no contract of service or at most a one-sided arrangement bearing no similarity to a master and servant relationship. While, as I have said, I think that Mr. Bryning's position was such that he could properly be described as an officer in the civil employment of Her Majesty, I also think that even if he fell to be regarded as a mere clerk or typist the action would not lie for the reasons given below.

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[30] [1917] A.C. 38.

[31] [1948] S.C.R. 57.

[32] Ante, p. 657.

[33] Ante, p. 653.

[34] [1955] A.C. 457, 489.

As regards Mr. Fox-Andrews' contention, I cannot think that the determining factor is the absence of the normal contractual relationship. The action per quod servitium amisit does not depend on the existence of a contract of service, but on the fact of service. The fact of service undoubtedly exists in every case between the Crown and those in its employ, even though that service is rendered under conditions in which either there is no contractual relationship or, if there is, the Crown can dismiss the employee at will. Though such conditions are different from those under which a servant other than a Crown employee renders services, I do not think that on that account alone it can be said that the action does not lie. The solution, I think, is to be found by a consideration of the origin and the development of the action—matters which were fully dealt with by Lord Simonds in the *New South Wales* case [35] and by my Lord, Denning L.J., in the present case. As there pointed out, the cases in which a master can recover damages for the loss of services of an injured servant were, until the end of the eighteenth century, confined to cases of menial servants: see *Taylor* v. *Neri*.[36] It is true that by the middle of the nineteenth century it had been applied to apprentices (see *Hodsoll* v. *Stallebrass* [37]) and to travellers: see *Martinez* v. *Gerber*.[38] But in neither of these cases was the matter argued, nor from the reports is it possible to ascertain the exact

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[35] [1955] A.C. 457.

[36] 1 Esp. 385.

[37] 11 Ad. & E. 301.

[38] 3 Man. & G. 88.

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conditions of the service; but for my part I am far from satisfied that these cases involved any extension. I think that when Eyre C.J. referred in *Taylor* v. *Neri*[39] to menial servants he was referring to menial servants in the strict sense used by Blackstone of servants living "intra moenia" as part of the household, or the family, and it may well be that the apprentice and the traveller in the later cases lived under the same conditions. If I am right in this, then to make the action applicable in the case of a person in the employment of the Crown would indeed involve a serious extension, not because the master is the Crown, not because of the special conditions of service in such cases, but because such an employee cannot be described as a menial servant in the sense indicated above. I can appreciate an argument in support of such an extension. Since 1947 the Crown is liable for the torts of all its servants as defined in the Crown Proceedings Act, 1947, s. 2 (6), and there would be something to be said, if only on grounds of reciprocity, for extending the action to cases of injury to all such servants. But as Lord Sumner said in *Admiralty Commissioners* v. *S.S. Amerika*[40]: "Indeed, what is anomalous about the action per quod servitium "amisit is not that it does not extend to the loss of service in "the event of the servant being killed, but that it should exist "at all. It appears to be a survival from the time when service "was a status."

Further, it would not be "in accord with modern notions or "with the realities of human relationships today" (to use Lord Simonds' words in the *New South Wales* case[41]) to extend the action to the loss of services of a person whose relationship to his master is wholly different in kind from that to which the action was originally applied or to which it has been extended by binding or long recognized authority.

This conclusion makes it unnecessary to decide the further question whether the plaintiffs could in any event recover as damages the amount of sick pay paid by the Crown admittedly as a matter of bounty. I am, however, inclined to think that they could claim that amount, not because it represents sick pay but because it is some criterion by which the loss of services could be measured. If instead of taking on and training a new servant the master reasonably chooses to keep on the injured servant and to pay him, it seems to me that the sums so paid, assuming they are reasonable, are some measure of the value of

[39] 1 Esp. 385, 386.

[40] [1917] A.C. 38, 60

[40] [1917] A.C. 38, 60.

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the services. Looked at in this way the case differs from that being considered in the *S.S. Amerika*,[42] and I am happy to think that this view is in accordance with the decision in regard to damages in *Rex* v. *Richardson*.[43]

So far as the last point is concerned, namely, whether assuming the action lay the Crown would be entitled to recover in full, it seems to me that if the argument for the Crown is right (and I see no answer to it) it is yet another reason for confining this class of action within the narrowest possible limits. I would dismiss this appeal.

Appeal dismissed with costs.

Solicitors: *Solicitor, Inland Revenue; White & Co.*

M. M. H.

[42] [1917] A.C. 38.

[43] [1948] S.C.R. 88.

ZBYTNIEWSKI *v.* BROUGHTON.

[Plaint No. 294.]

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June 29;
July 19, 20.

Lord Evershed M.R., Jenkins and Hodson L.JJ.

Landlord and Tenant — Rent restriction — Possession application — Premises overcrowded—Notice to quit—Tenant guilty of offence of overcrowding when proceedings started—Tenant not guilty of offence at date of hearing — Whether landlord entitled to possession — Housing Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *ss.* 59 (3), 61, 65.

The defendant was tenant of a single room, being a dwelling-house within the Rent Acts. He had no child when he went into occupation in 1950 with his wife. Subsequently, two children were born, one on December 12, 1950, and the other on May 3, 1952. As a result the room became overcrowded under the provisions relating to overcrowding in Part IV of the Housing Act, 1936. The landlord served notice to quit on the tenant on January 3, 1956, and started proceedings for possession on February 23, 1956. Before the landlord's claim for possession was heard, the tenant on March 12, 1956, applied to the local authority for suitable alternative accommodation and, as a consequence, thereafter by virtue of the provisions of section 59 (3) of the Act of 1936 [1] he was

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[1] Housing Act, 1936, s. 59: "(1) "Subject to the provisions of this Part "of this Act, if after the appointed "day the occupier or the landlord "of a dwelling-house causes or per- "mits it to be overcrowded, he shall "be guilty of an offence and shall "be liable on summary conviction to "a fine not exceeding £5 and to a "further fine not exceeding £2 in "respect of every day subsequent to "the day on which he is convicted "on which the offence continues. . . ."

"(3) Where after the appointed day "a dwelling-house which would not "otherwise be overcrowded becomes

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no longer guilty of the offence of permitting the premises to be overcrowded. The landlord claimed to be entitled to recover possession under section 65 (1) of the Act of 1936 [1] on the ground that the dwelling-house was overcrowded "in such circumstances as to render "the occupier thereof guilty of an offence":—

Held, that the effect of section 65 (1) of the Housing Act, 1936, was that where a dwelling-house was in a state of being overcrowded and where the relevant circumstances were such as to make that overcrowding an offence, then the fetter upon the jurisdiction to make orders for possession of rent-restricted premises was, for the time being, removed, but that the removal was coincident in point of time with the continuance of that state of affairs and that the position did not crystallize once and for all when the proceedings were begun, and, further, that the tenant, having ceased before the trial of the action to be guilty of any offence, section 65 (1) had ceased to apply and the tenant at the date of the hearing was in the position of a statutory tenant against whom a landlord was seeking an order for possession without establishing any of the necessary conditions precedent under the Rent Acts to invest the court with jurisdiction to make an order.

Bowness v. *O'Dwyer* [1948] 2 K.B. 219; 64 T.L.R. 367; [1948] 2 All E.R. 181; *Oak Property Co. Ltd.* v. *Chapman* [1947] K.B. 886; 63 T.L.R. 338; [1947] 2 All E.R. 1; and *Bird* v. *Hildage* [1948] 1 K.B. 91; 63 T.L.R. 405; [1947] 2 All E.R. 7 distinguished.

Quaere whether a tenant could for the purpose of the jurisdiction to order possession be treated as guilty of an offence within the meaning of section 65 (1) unless he had been actually convicted.

"overcrowded by reason of a child "attaining one of the ages referred "to in the last foregoing section, "then, if the occupier applies to the "local authority for suitable alternative accommodation . . . he shall "not be guilty of an offence under "this section in respect of the overcrowding of the house after the "date of his application, so long as "all the persons sleeping in the house "are persons who were living there "on the date when the child attained "that age and thereafter continuously "live there, or children born after "that date of any of those persons, "unless—(*a*) suitable alternative accommodation is offered to the "occupier. . . ."

S. 61: "(1) Where it appears to "the local authority, having regard "to the existence of exceptional circumstances, to be expedient so to "do, they may, on the application of "the occupier or intending occupier "of a dwelling-house in their district, "grant him a licence authorizing him "to permit such number of persons "in excess of the permitted number "as may be specified in the licence "to sleep in the house."

S. 65: "(1) Where a dwelling-"house is overcrowded in such "circumstances as to render the "occupier thereof guilty of an "offence, nothing in the Rent and "Mortgage Interest Restrictions Acts, "1920 to 1933, shall prevent the land-"lord from obtaining possession of "the house. (2) Where a landlord "comes into possession of a house by "virtue only of the provisions of the "foregoing subsection then, notwith-"standing anything in section 2 "of the Rent and Mortgage Interest "Restrictions Act, 1923, the Rent and "Mortgage Interest Restrictions Acts, "1920 to 1933, if applicable to the "house, shall not cease to apply "thereto by reason only of the fact "that the landlord comes into posses-"sion of the house."

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BROUGHTON.

APPEAL from Judge Daynes Q.C., sitting at West London County Court.

The defendant, John Broughton, became tenant on September 16, 1950, of a single room at 6, Templeton Place, Kensington, such room constituting a dwelling-house for the purposes of the Rent Acts. He lived there with his wife, a child being born on December 12, 1950, and a second child on May 3, 1952. After the eldest child attained one year of age the premises became overcrowded within section 58 (1) of the Housing Act, 1936, and Schedule V thereto.

In January, 1955, the plaintiff, Franciszek Zbytniewski, purchased 6, Templeton Place, subject to the tenancy of the room which had been let to the defendant. On January 3, 1956, the plaintiff, as landlord, served notice to quit on the tenant and on February 23, 1956, started proceedings to recover possession. On March 12, 1956, the tenant applied to the local authority under section 59 (3) of the Housing Act, 1936,[1] for alternative accommodation. From that date the tenant ceased to be guilty of an offence under the Act of 1936.

The landlord contended that, having regard to the provisions of section 65 (1) of the Act, he was entitled to an order for possession, since the tenant was guilty of an offence at the time when the landlord started his proceedings.

The county court judge dismissed the landlord's application on the ground that at the date of the hearing on May 7, 1956, the tenant was not then guilty of an offence within section 65. The landlord appealed.

J. M. Shaw for the landlord. Under section 65 of the Housing Act, 1936, a landlord is entitled to obtain possession of premises which are overcrowded, notwithstanding the fact that the tenant is protected by the Rent Acts. The question is what is the relevant date for determining whether premises are overcrowded for the purposes of the Act of 1936. It is submitted that the relevant date is the date of the issue of the summons for possession. For the purposes of determining a landlord's right under the Rent Acts that is always the relevant date. For example, for the purpose of paragraph (*a*) of the Schedule to the Rent Restrictions Act of 1933 the question is whether the tenant is in arrears with his rent when the summons is issued. The date of the hearing is only relevant in regard to the question whether it is reasonable to make an order for possession. Once the protection of the Rent Acts is removed from the tenant, the landlord can assert his common law right and go into possession. It is only the statutory rights of the tenant which prevent the landlord asserting his common law rights. In practice a landlord does not exercise his common law right to take possession but applies to the court for an order. A tenant who is guilty of overcrowding the premises which he occupies generally applies to the local authority for alternative accommodation. In practice there is generally little danger of eviction under the provisions of section 65. [Reference was made to *John M. Brown Ltd.* v. *Bestwick* [2]; *Leslie & Co. Ltd.* v. *Cumming* [3]; *Bowness* v. *O'Dwyer* [4]; *Brown* v. *Brash and Ambrose* [5]; *Dudley and District Benefit Building Society* v. *Emerson* [6]; *Wolfe* v. *Hogan* [7]; *Oak Property Co. Ltd.* v. *Chapman* [8]; *Tovey* v. *Tyack*,[9] and *Baker* v. *Turner*.[10]]

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[1] See p. 673.

Goldthorpe v. *Bain* [11] is the only case where the date of the hearing was held to be the relevant date, and in that case the question was whether it was reasonable to make an order for possession. [Reference was also made to *Bird* v. *Hildage* [12] and *Benninga (Mitcham) Ltd.* v. *Bijstra*.[13]] Once a tenant is guilty of an offence of overcrowding, then under section 65 his landlord can assert his right to possession. In section 65 " where " means " whenever." It does not mean locality. " Where " there means a point of time.

D. P. F. Wheatley for the tenant. The Rent Restriction Acts place a fetter on the jurisdiction to make an order for possession. The question is whether the court has jurisdiction to make such an order when a case comes before them. " Where " in section 65 means " if and so long as "; the meaning was discussed in *Woozley* v. *Woodall Smith*.[14] In construing a penal statute " where " should be construed as meaning " if and so long as." The tenant was holding over under the protection of the Rent Acts. He was a tenant within section 15. After the notice to quit was served he was protected: *Remon* v. *City of London Real Property Co. Ltd.*[15] So long as the overcrowding continued, the fetter on the court's jurisdiction to order possession was removed. A tenant is only guilty of an offence in certain circumstances. Those circumstances did not exist when the landlord's summons for possession came before the court.

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[2] [1951] 1 K.B. 21; 66 T.L.R. (Pt. 2) 248; [1950] 2 All E.R. 338.

[3] [1926] 2 K.B. 417; 42 T.L.R. 504.

[4] [1948] 2 K.B. 219; 64 T.L.R. 367; [1948] 2 All E.R. 181.

[5] [1948] 2 K.B. 247; 64 T.L.R. 266; [1948] 1 All E.R. 922.

[6] [1949] Ch. 707; 65 T.L.R. 444; [1949] 2 All E.R. 252.

[7] [1949] 2 K.B. 194; [1949] 1 All E.R. 570.

[8] [1947] K.B. 886; 63 T.L.R. 338; [1947] 2 All E.R. 1.

[9] [1955] 1 Q.B. 57; [1954] 3 All E.R. 210.

[10] [1950] A.C. 401; 66 T.L.R. (Pt. 1) 780; [1950] 1 All E.R. 834.

[11] [1952] 2 Q.B. 455; [1952] 1 T.L.R. 1512; [1952] 2 All E.R. 23.

[12] [1948] 1 K.B. 91; 63 T.L.R. 405; [1947] 2 All E.R. 7.

[13] [1946] K.B. 58; 61 T.L.R. 519; [1945] 2 All E.R. 433.

[14] [1950] 1 K.B. 325; 66 T.L.R. (Pt. 1) 99; [1949] 2 All E.R. 1055.

J. M. Shaw in reply. In section 65 the phrase "obtaining "possession of the house" is not restricted to obtaining possession by order of the court. It would be strange if a landlord, instead of using self-help and taking possession, applies to the court, he loses his right to possession. [Reference was made to *J. F. Stone Lighting and Radio Ltd.* v. *Levitt*[16] and *Hill* v. *Hasler.*[17]]

LORD EVERSHED M.R. We have been greatly assisted in this case by the careful argument of Mr. Shaw, for the landlord, who has very properly drawn our attention to a considerable number of the still greater quantity of cases to which the rent restriction legislation has in the course of more than a quarter of a century given rise.

The question which we have to determine is one of the construction of a few words in section 65 (1) of the Housing Act, 1936: "Where a dwelling-house is overcrowded in such circum-"stances as to render the occupier thereof guilty of an offence, "nothing in the Rent and Mortgage Interest Restrictions Acts, "1920 to 1933, shall prevent the landlord from obtaining "possession of the house."

[His Lordship stated the facts and continued:] At the date when the present proceedings started in 1956, the tenant's occupation of this dwelling-house by himself, his wife and his two infant daughters constituted overcrowding within the meaning of the Housing Act so as to render him, according to its language, guilty of an offence under that Act. Whether the tenant was then aware of the impact of that piece of legislation, I do not know; but he quite plainly became aware of it soon after the proceedings started, because he proceeded to make application to the appropriate authority in order that he might cease to be guilty of an offence and thereby put an end to his guilt as an occupant of an overcrowded dwelling-house. It follows that, when the case came on for trial, it was no longer true to say that the dwelling-house in question was "overcrowded in such circumstances as to render the occupier

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[15] [1921] 1 K.B. 49; 36 T.L.R. 869.

[16] [1947] A.C. 209; 62 T.L.R. 737; [1946] 2 All E.R. 653.

[17] [1921] 3 K.B. 643.

"thereof guilty of an offence." The tenant therefore claimed, in reliance upon the Rent and Mortgage Interest Restrictions Acts, 1920 to 1933, that no case had been established for making an order against him for possession. The judge so held. The judge further expressed the view that, in any event, an occupier could not for the purposes of the jurisdiction to order possession be treated as guilty of an offence within the meaning of section 65 unless he had actually been convicted. We have not heard any argument from Mr. Wheatley upon that point, and I therefore express no view upon it, save to say that I must not be taken to be assenting to the judge's expression of opinion that conviction is necessary for present purposes to constitute the guilt indicated by section 65. It is unnecessary for me to express a view upon that matter, because I am of the same view as the judge upon the first point, namely, that for the purpose in hand, the disability which section 65 imposes upon the court's powers to give effect to the Rent Restrictions Acts did not exist at the time of the trial and, therefore, no other case being shown, the duty of the court was to give effect to those Acts and to refuse an order for possession.

In a sentence, the argument for the landlord has been that the matter is concluded one way or the other by the state of the facts as they were when the proceedings began. If at that date it is shown that the occupier was guilty of the offence of overcrowding, then he cannot (so runs the argument) put himself right, so to say, by later applying to the local authority and thereby giving rise once more to his defences under the Rent Acts.

The proposition is founded, I think, not so much upon the strict wording of this subsection as by invoking what is undoubtedly a rule of general application in rent restriction cases, namely, that where a landlord in a rent restriction case proceeds to invoke the jurisdiction of the court and to claim an order for possession, then you should look at the state of the facts as they are alleged and proved to be at the date when the proceedings are started.

That general rule finds expression in many cases which have been cited to us, and I shall not take time by quoting all of them. One of the earliest cases is *Bowness* v. *O'Dwyer*[1] in this court. There, the question arose under section 3 (2) (*b*) of the Rent and Mortgage Interest Restrictions Act, 1939, as amended; that is to say, it raised the question of the extent to which the rent payable was attributable to payments in respect of board, attendance and the use of furniture. The facts and the decision are not strictly relevant for present purposes, but in the judgment of the court, which was delivered by myself, the statement is found [2]: "It is true that the general rule under the Rent "Acts is that the status of any premises, for the purpose of the "Acts, should be determined at the date when the landlord seeks "to enforce his rights," that is, when he initiates the proceedings for that purpose.

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[1] [1948] 2 K.B. 219; 64 T.L.R. 367; [1948] 2 All E.R. 181.

Oak Property Co. Ltd. v. *Chapman*,[3] which had been decided in the previous year, was a case where the question involved was whether the subletting, which had occurred, was a lawful subletting—a familiar topic under the Acts. Again, in the judgment of this court I find the phrase [4]: "From this case "[*Norman* v. *Simpson* [5]] and others which have since followed "it, the principle must now, in our judgment, be taken as "established that, in a case arising under section 15 (3) of the "Act of 1920, the relevant facts must be determined at the date "of the institution of proceedings."

Not seeking to multiply cases too much, I confine myself to one other instance where the question was as to arrears of rent: *Bird* v. *Hildage*.[6] In the judgment of Cohen L.J. it is stated as follows [7]: "Section 3 and Schedule I lay down the circum"stances in which the court may make an order or give a "judgment for recovery of possession, and we think that, in "reaching a conclusion whether any rent is lawfully due and has "not been paid, the court must look at the date of institution "of the proceedings by which the landlord is seeking to "recover possession. The rights of the parties crystallized at that "date, and nothing happening thereafter could, in our opinion, "deprive the court of jurisdiction to make an order for recovery "of possession, if the court thought it reasonable to do so."

I should, however, add that, in considering if an order for possession under the Acts is reasonable or not, it is, I think, equally plain that regard must be had to the circumstances as known to the court up to and including the trial of the case. But I have cited sufficient of the authorities to show that there is this general conception (to use the word used in one of the earlier cases) that where the status of the premises is the question in issue, or where the question is whether the jurisdiction of the court to make an order has arisen, in those cases the facts must, prima facie, be determined at the date when the landlord proceeds to invoke the court's powers by issuing proceedings.

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[2] [1948] 2 K.B. 219, 228.

[3] [1947] K.B. 886; 63 T.L.R. 338; [1947] 2 All E.R. 1.

[4] [1947] K.B. 886, 895.

[5] [1946] K.B. 158; 62 T.L.R. 113; [1946] 1 All E.R. 74.

[6] [1948] 1 K.B. 91; 63 T.L.R. 405; [1947] 2 All E.R. 7.

[7] [1948] 1 K.B. 91, 98.

I have made that excursion into the other cases; but it is none the less clear that the so-called rule, which I have indicated, is by no means one of absolute and universal application whenever one gets a case in which any reference to the Rent Acts is necessary. The question for the court still remains in such a case as the present, what is the true meaning and effect of the section which we now have to consider? The first thing to bear in mind, in approaching this matter, is that the provisions of this part of the Housing Act, 1936, are not directed to a consideration or determination of the respective rights of landlord and tenant. They are concerned with quite a different subject-matter, namely, to prevent by appropriate means the social evil of overcrowding. It seems to me that the provisions which we have to construe are designed first and last as a means whereby that end may be secured. Second, it is to be borne in mind—and this is perhaps the corollary of what I have just said—that we are not here concerned with the status of the dwelling-house for Rent Act purposes. Nor are we concerned with some particular set of facts which, under the Rent Acts, gives to a landlord a right to invoke the court's jurisdiction to make a possession order in his favour.

It is not, I think, in doubt that the tenant became, on expiry of the valid notice to quit, a statutory tenant, as that formula is understood under the Rent Acts. It is not suggested that he ceased to be a statutory tenant, or that the dwelling-house, by reason of the overcrowding which existed when the proceedings began, was taken altogether out of the ambit of those Acts. Let me read again the subsection: "Where a dwelling-house is "overcrowded in such circumstances as to render the occupier "thereof guilty of an offence, nothing in the Rent and Mortgage "Interest Restrictions Acts, 1920 to 1933, shall prevent the "landlord from obtaining possession of the house."

In my judgment, Mr. Wheatley is entitled to say, as the foundation of his argument for the tenant, that this remained a rent-controlled house, and the tenant was and is a statutory tenant in respect of it. All the subsection says is that where the circumstances are such as they are stated to be—and I shall have to come back to define what that means—then the right which a tenant has to say " You cannot evict me unless certain "requirements of the Rent Acts are complied with" shall not operate. I repeat, the object of the Act in so providing is not to confer upon the landlord a private right, but to put an end to the ill of overcrowding.

There is one other general observation I should like to make, which turns on the phrase "guilty of an offence." I find it unnecessary to express a considered view whether conviction is necessary in this or in other cases; but section 59 provides that "if after the appointed day the occupier . . . of a dwelling-house "causes or permits it to be overcrowded," then he is guilty of an offence and shall be liable on summary conviction to a fine not exceeding a stated figure. In other words, an occupier occupying an overcrowded dwelling-house is stated, according to the language of section 59, to be guilty of an offence and to be liable on summary conviction to a penalty. Section 65, therefore, is saying that, if the circumstances are such that the occupier is so guilty of an offence and so liable on conviction to a penalty, then certain consequences follow.

It appears to me that since criminal liability is thus involved, it would, prima facie, be contrary to general principle to say that the disability which section 65 attaches to guilt of the offence should subsist any longer than the guilt itself persists. That is a feature of this case which is plainly distinct from the characteristics of cases like *Bowness* v. *O'Dwyer*,[8] *Oak Property Co. Ltd.* v. *Chapman*[9] and *Bird* v. *Hildage*,[10] where private rights only were in issue.

Let me, therefore, turn to the actual matter in hand, namely, the construction of the subsection. That the purpose of this part of the Act of 1936 is the abatement of overcrowding, is emphasized by the circumstance that the relevant Part IV of the Act is headed "Abatement of Overcrowding"; and section 57 imposes on local authorities a duty to inspect, make reports, and so forth. Then, in section 58 there is the definition of overcrowding. It is a dual or alternative definition, but for the present purposes it will suffice for me to take the second of the two alternatives: "A dwelling-house shall be deemed for the "purposes of this Act to be overcrowded at any time when the "number of persons sleeping in the house . . . (*b*) is, in relation "to the number and floor area of the rooms of which the house "consists, in excess of the permitted number of persons as "defined in the Fifth Schedule to this Act."

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[8] [1948] 2 K.B. 219.

[9] [1947] K.B. 886.

[10] [1948] 1 K.B. 91.

So far as the present case is concerned it will appear by reference to subsection (2) of section 58 and to the Fifth Schedule that the maximum number for this dwelling-house was two, and that, when the first daughter became a year old on December 12, 1951, the number was regarded, for the purposes of the Act, as being two and a half, and has since become three.

Then comes the section to which I have already briefly referred, section 59, "Offences in relation to overcrowding"; and it is right that I should make particular reference to subsection (5), because Mr. Wheatley, for the tenant, referred to it: "The landlord of an overcrowded house shall be deemed to cause "or permit it to be overcrowded—(*a*) if, after notice in writing "that it is overcrowded in such circumstances as to render the "occupier thereof guilty of an offence has been served upon the "landlord or his agent by the local authority, the landlord fails "to take such steps as it is reasonably open to him to take for "securing the abatement of the overcrowding, including if "necessary legal proceedings for possession of the house."

In the present case, it is not in doubt that the landlord has not had such a notice, and has not failed to do anything that he ought to have done. There is here no question of the landlord being in any sort of peril; but the reference to the taking of legal proceedings has a relevance, to which I shall revert.

I come back to section 65, and it is, I think, useful to read into the section the language of the definition. The subsection opens: "Where a dwelling-house is overcrowded in such circum-"stances as to render the occupier thereof guilty of an offence, ". . ." It would, therefore, in the present case be "overcrowded "so as to render the occupier thereof guilty of an offence, by "reason of the fact that the occupier has caused or permitted at "any time the number of persons sleeping in the house, having "regard to the floor area and the number of rooms, to be in excess "of two." Where, therefore, this dwelling is *at any time* so occupied that the number of persons sleeping in the house is in excess of two, then (as I construe the words) *during* that time nothing in the Rent Acts shall prevent the landlord from obtaining possession of the house.

It follows, to my mind, that, bearing in mind that definition, and having regard particularly to the words "in such circum-"stances as to render," then, as a matter of construction, this subsection is saying, in effect, "Where the circumstances are "found to be such that the occupier is committing an offence "under the Act, then so long as that offence continues nothing "in the Rent Acts is to prevent the landlord from obtaining "possession."

I do not find it necessary to say whether the word "Where" should be read as "If and so long as," or as "In a case in "which"; because in the end of all, I think the result is the same: nothing in the Rent Acts is to prevent a landlord from obtaining possession where—and, as I say, it does not matter if you say "If and so long as" or "In a case in which the "circumstances are such that"—there is overcrowding within the Act. Bearing in mind all the background to which I have referred, I think that the prohibition against the landlord obtaining a possession order is contemporaneous with the circumstances which give rise to the prohibition. It would, as it seems to me, be contrary not only to the matters of principle which I think are involved when the purposes of this section and the reference to a criminal offence are borne in mind, but contrary also to the language of this section, if you say: "Once this offence is shown "to have been committed at the date when the landlord starts "proceedings, then nothing that the tenant can thereafter do "will avail him so as to entitle him to rely upon the Act which "prima facie he is entitled as a statutory tenant to invoke."

I have said at length what Judge Daynes said, in the course of his judgment: "Proceedings preliminary to the hearing are of "importance; but a judge's aim should be to do justice according "to the position when the case comes before him. It is true "that a plaintiff must have a cause of action when he sues, "though, of course, a related cause of action can be made "subsequently the subject of another action and consolidated "with the first action. It has, however, long been recognized "that a defendant can rely on events which have happened since "action brought. This is no new rule introduced by or since the "Judicature Acts."

One final matter which I must deal with, because it was much stressed by Mr. Shaw in opening and also in reply, is that the final words of section 65 (1), ". . . nothing in the Rent and "Mortgage Interest Restrictions Acts, 1920 to 1933, shall "prevent the landlord from obtaining possession of the house," are not expressly confined, or, indeed, related, to obtaining possession by an order of the court. Mr. Shaw said: "Supposing "that the contractual tenancy has been determined, then, apart "from the protection given by the Rent Acts, or the shield of the "Rent Acts, the landlord could re-enter peaceably, not by virtue "of any order of the court, but by going there when the tenant "happened to be out and locking the door." So, Mr. Shaw says, if the view for which he contends is not right, you would get the anomaly that if, on the date when the landlord issued his proceedings, and when admittedly the tenant was occupying the house in such circumstances as to constitute an offence, the landlord had just gone there and, finding the tenant and his family out, had secured the door to prevent their re-entry, no one could have complained; in other words, he would have got possession and that would have put an end, once and for all, to the tenant's rights. I am not prepared, as at present advised, to accept the premise of this argument. It may be that if the landlord had done that, then, at the time he did it, he would have done nothing unlawful. I will assume that section 65 (1) is not intended to relate only to an application to the court for a possession order; though the relevant language of subsection (5) of section 59 (which I have earlier quoted) appears to be limited to the case of a landlord obtaining possession by means of a court order. Still it does not follow, as it seems to me, that because at that point of time the tenant, being guilty of an offence, could not have complained of the landlord's conduct, the tenant could not have thereafter put himself right by an application to the local authority and then claimed to be allowed to go back; for, as I have already pointed out, this section does not say that the rights of the statutory tenant as such cease, or that the dwelling-house is taken altogether out of the Act, or taken out of it so far as the tenant's tenancy is concerned.

It is not necessary for me to express a final view upon that matter, for the landlord did not, in fact, follow that course. He sought, by going to the court, an order for possession, and the question we have to decide is whether it was conclusive against the tenant that at the date the proceedings started the tenant was guilty of an offence under the Act, so that the landlord could say that nothing in the Rent Acts could thereafter prevent him from getting, by the route he had chosen, an order for possession. For the reasons which I have indicated, I think the state of affairs as it existed at the date of the institution of proceedings did not conclude the matter against the tenant; that the tenant having ceased before the trial to be guilty of any offence, the circumstances mentioned in section 65 which gave rise to the prohibition had ceased to exist; and that the tenant was, therefore, left at the date of the trial in the position of a statutory tenant against whom a landlord was seeking an order for possession without establishing any of the necessary conditions precedent under the Rent Acts to invest the court with the jurisdiction to make the order. For those reasons, I think the judge rightly decided this action and I would dismiss the appeal.

JENKINS L.J. I agree that this appeal fails. It is not disputed that the tenant and his wife could properly live in the one room, but section 58 (2), to which my Lord referred, is material as regards the children, for it provides: "In determining for the "purposes of this section the number of persons sleeping in a "house, no account shall be taken of a child under one year old, "and a child who has attained one year and is under 10 years "old shall be reckoned as one-half of a unit." So while there was no overcrowding in the first instance, the room became overcrowded under the Act on December 12, 1951, when the elder child attained the age of one year and thus began to count as half a person for the purposes of the legislation. Thus, by the mere process of his elder child growing up, the tenant committed an offence under the Act.

The present proceedings were begun in February, 1956, the particulars of claim being dated February 23. After he had been served with the proceedings, the tenant, on March 12, 1956, availed himself of the provisions of subsection (3) of section 59 of the Housing Act, 1936. That subsection provides: "Where "after the appointed day a dwelling-house which would not "otherwise be overcrowded becomes overcrowded by reason of a "child attaining one of the ages referred to in the last foregoing "section, then, if the occupier applies to the local authority for "suitable alternative accommodation or has so applied before "the date when the child attains that age, he shall not be guilty "of an offence under this section in respect of the overcrowding "of the house after the date of his application, so long as all "the persons sleeping in the house are persons who were living "there on the date when the child attained that age and there-"after continuously live there, or children born after that date "of any of those persons. . . ." Then the subsection goes on to deal with certain exceptions from the effect of such an application as preventing an offence under the Act.

The position then was that until a date after the commencement of the proceedings the tenant was committing an offence under the Act, but after his application of March 12, 1956, to the local authority he was no longer committing an offence.

In those circumstances, the question for the court is whether, notwithstanding the fact that no offence is now being committed and none has been committed since March 12, 1956, the landlord can avail himself of the past offence, so as to obtain possession of the house, notwithstanding anything contained in the Rent Restrictions Acts.

My Lord has referred to some of the many authorities which have a general bearing on the question raised, and to which our attention was very properly directed. I agree with my Lord that one may say, very broadly, that a general rule is discernible in these cases to the effect that the material date for the purpose of determining whether a landlord's claim for possession is well-founded is the date when the proceedings are commenced. On the other hand, where the question is whether the court has jurisdiction to make an order, and certainly where the question for the court is whether it is reasonable to make an order, it may be said that, generally speaking, the material date is the date when the matter comes before the court.

I do not propose to refer to any of the cases, for I find nothing in them which constrains us to hold that under section 65 a tenant loses once and for all the protection of the Rent Acts if it can be shown that he has at any time committed an offence under the Housing Act, 1936, even though he may be no longer committing such an offence. Nor, in my view, are we bound by authority to hold that if the tenant is committing an offence at the date of the commencement of the proceedings but ceases to be committing any offence before the case comes before the court, then the landlord is entitled to claim possession notwithstanding anything in the Rent Acts.

In my view, the question must be decided as a matter of construction of section 65 (1), which provides: "Where a "dwelling-house is overcrowded in such circumstances as to "render the occupier thereof guilty of an offence, nothing in the "Rent and Mortgage Interest Restrictions Acts, 1920 to 1933, "shall prevent the landlord from obtaining possession of the "house."

That subsection, on the face of it and according to the natural meaning of the language used, seems to me to provide that while certain conditions exist or if certain conditions exist in any given case, then nothing is to prevent the landlord from obtaining possession. The conditions are that the dwelling-house should be overcrowded, and further, that it should be overcrowded in such circumstances as to render the occupier guilty of an offence. It seems to me that in order to show that the tenant is no longer protected by the Act, the landlord must satisfy the court that both those conditions are fulfilled at the material time, and it seems to me that the material time must be the time when the matter comes before the court.

I think the effect of section 65 is this: where a dwelling-house is in the state of being overcrowded, and where the relevant circumstances are such as to make that overcrowding an offence, then the fetter upon the jurisdiction of the court to make orders for possession on rent-restricted premises is for the time being removed, but the removal is coincident, as I see it, in point of time with the continuance of that state of affairs. I see no sufficient reason in the language of the section to make it necessary to hold that the position crystallizes once and for all when the proceedings are begun. Like my Lord, I have found some assistance from the process of reading into section 65 the definition of "overcrowding" in section 58. I think that assists the view that the intention of the section is to apply where the house is overcrowded at the date when the court has to decide the question whether the landlord is entitled to possession notwithstanding the provisions of the Acts.

Little assistance can be derived, I think, from other sections of the Act of 1936. Section 61 is the section under which a local authority can grant licences to permit occupation of premises by a larger number of persons than the number permitted by the Act in the ordinary way. The effect of such a licence is thereafter to prevent any offence of overcrowding being committed by reason of the occupation of the house by the number of persons allowed by the licence.

It seems to me that the machinery of that section to some slight extent tends to support the view I have formed as to section 65. If proceedings were taken for possession of premises which were overcrowded at the commencement of the proceedings and the tenant then applied for and obtained a licence, it seems to me that it would be a curious result if, notwithstanding the licence given by the local authority to regularise the position, the court was still bound at the suit of the landlord to grant possession, and thus, in effect, override the licence, on the strength of the overcrowding which had taken place before the licence was granted.

There is one other matter to which perhaps I should refer, because I think Mr. Shaw did to some extent rely upon it.

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Subsection (2) of section 66 of the Act, which is the section which makes it "the duty of the local authority to enforce the foregoing provisions of this part of this Act," provides: "The local authority may serve upon the occupier of a dwelling-house which is overcrowded in such circumstances as to render him guilty of an offence notice in writing requiring him to abate the overcrowding before the expiration of fourteen days from the date of the service of the notice, and, if at any time within three months from the expiration of that period the house is in the occupation of the person upon whom the notice was served or of a member of his family and is overcrowded in such circumstances as to render the occupier guilty of an offence, the local authority may make complaint to a court of summary jurisdiction and thereupon the court shall, by its warrant in the form set out in the Schedule to the Small Tenements Recovery Act, 1838, or in a form to the like effect, order vacant possession of the dwelling-house to be given to the landlord within such period, not being less than fourteen nor more than twenty-eight days, as they may determine." The procedure contemplated by that subsection appears to be: first, a 14 days' notice requiring the overcrowding to be abated; then a period of three months allowed from the date of the service of the notice with a view to the overcrowding being abated, and failing such abatement, then, if the house is in occupation of the persons upon whom the notice was served, or the members of his family, the local authority may make complaint and thereupon the warrant must issue under the mandatory provision. So, in proceedings under that subsection, it may be said that the position crystallizes at the end of the period of three months, and provided the house is still overcrowded at the date when the complaint is made to the court of summary jurisdiction, then the order for possession must go.

I do not think that subsection, with the special procedure it lays down, really casts any light on the meaning of section 65. In framing section 66 (2) in the way in which it appears in the Act, it may well have been thought that if a person upon whom a notice was served failed to take any steps to abate the overcrowding for a period of three months and was still in occupation of the premises at the end of that time, or a member of that person's family was still in such occupation, it was plain that the person guilty of overcrowding was not to be trusted to comply with the provisions of the Act, and ought to be ejected accordingly.

The point is in a small compass, turning, as it does, on the meaning of one relatively short provision contained in section 65 (1); but paying the best attention I can to the language of the subsection, and bearing in mind that its object is manifestly to prevent overcrowding and not to benefit the landlord by giving him an additional opportunity of obtaining possession, I think that, on the true construction of the subsection, it has the effect given to it by my Lord and by the county court judge, and, accordingly, I would dismiss this appeal.

HODSON L.J. I agree with my Lords and with the county court judge that this appeal fails on the ground that upon the true construction of section 65 (1) of the Housing Act of 1936 the material date for consideration is the date when the matter comes before the court.

One must concede that, on principle and authority, in cases arising under the Rent Restrictions Acts, as under other Acts or in any other litigation, the material date for the crystallization of the rights of the parties is normally the institution of proceedings; but for the reasons which my Lords have given and to which I have nothing to add, it seems to me that, upon the true construction of this section, the material date is not the date of the institution of the proceedings, but rather the date when the matter comes before the court. That construction is consonant with the whole purpose of this part of the Act, which has to do not with the assistance of landlords or with the protection of tenants, but with the prevention of overcrowding. Thus at the material date on the facts of this case the defendant was not guilty of the offence.

There is one other thing that I might add. With all respect to the county court judge, I cannot agree with him that this unfortunate tenant was not proved ever to have been guilty of overcrowding. When his elder daughter celebrated her first birthday and he continued to live in the house thereafter, it seems to me that the automatic effect of the Act of 1936 was to make him guilty of an offence for which he might have been fined, although no doubt he knew nothing about that. The county court judge appeared to take the view that, in order to bring the matter home in civil proceedings, it would be necessary to do it by means of a conviction. So far from that being the case, it appears to me to be settled law that a conviction would be no

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evidence of his guilt in civil proceedings. That was decided in the case of *Hollington* v. *F. Hewthorn & Co. Ltd.*[11]. In my opinion this appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Maude & Tunnicliffe; How, Davey & Lewis.*

B. A. B.

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[11] [1943] K.B. 587; 59 T.L.R. 321; [1943] 2 All E.R. 35.

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2. —— *Court of Criminal Appeal—Reference by the Home Secretary—Consideration of court confined to ground of reference—No consideration of general matters of appeal — Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 19 *(a).*
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3. —— *Evidence—Child, by—Corroboration — Indecent assaults on children — Whether children, assaulted or not, can give corroborative evidence of assaults on other children.*
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5. —— *Fraud—Obtaining credit by fraud— " Obtaining credit " — Contracts to carry out electrical work—Payments received in advance —Failure to carry out work—No intention to do work at time payments received—Whether credit obtained — " Credit " — " Liability " — Debtors Act*, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 13 (1).
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2. —— *View by judge—Value as evidence—Injury to plaintiff while cleaning machine—Action against employers for personal injuries—Demonstration on machine by plaintiff how accident occurred—Evidence for plaintiff that cleaning method dangerous—No evidence for defendants—Finding by judge that accident due to plaintiff's own carelessness—Right of judge to rely on own impressions formed at view—County Court Rules, Ord.* 23, *r.* 14.
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5. —— *Rent—Gold clause—Lessee to pay stipulated rent "either in gold sterling or "Bank of England notes to the equivalent "value in gold sterling" — Whether words define measure of lessee's obligation or mode of discharge—Meaning of "gold sterling"—Whether "value" means nominal currency value or intrinsic gold content value of gold coins of sterling currency — Whether clause contrary to public policy—Coinage Act*, 1870 (33 *&* 34 *Vict. c.* 10), *s.* 6.
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7. —— *Rent restriction — Premises within the Acts—Conversion after* 1954*—Flat made self-contained—"Other premises"—Meaning —Housing Repairs and Rents Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 53), *s.* 35 (1).
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Volenti non fit injuria. Invitor and Invitee. Invitee or licensee—Duty of occupier—No valid distinction.
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Vicarious Liability—Indemnity for servant. Joint tortfeasor—Contribution. Road traffic—Third party insurance. Insurance—Subrogation—No payment—Express right to bring proceedings.

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2. —— *Per quod servitium amisit, action—Civil servant—Injury by accident—Crown's claim for loss of services not maintainable—Action limited to claims in respect of "menial "servants"—Measure of damages—Voluntary payment of wages during sickness—Wages not recoverable as such—Wages as measure of value of lost services.*

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Habeas Corpus—Jurisdiction of inferior court to order detention—Power of superior court—Return to writ ordered—Court's power to examine truth of facts set out in return—Power to inquire whether there was evidence on which magistrate could make reception order—Mental defective—Reception order—Habeas Corpus Act, 1816 (56 *Geo.* 3, *c.* 100), *ss.* 3, 4.

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2. ——. See Licensor and Licensee.

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2. —— Trial with jury. See Libel and Slander.

RAILWAY—*Powers—Right of way—Dedication—Footpath over private accommodation bridge—Presumption of dedication by long user by public—Power of railway authority to dedicate—Test to be applied—Consistency with purposes of railway—Question of fact—Railways Clauses Consolidation Act,* 1845 (8 *&* 9 *Vict. c.* 20), *ss.* 16, 68—*National Parks and Access to the Countryside Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 97), *s.* 31.

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2. —— *Hereditament—Meaning—Mechanized bakery and repair shop on opposite sides of street—Proximity of repair shop necessary for proper working of bakery—Whether one or two hereditaments—Considerations to be taken into account—Rating and Valuation (Apportionment) Act,* 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3 (2) (3).

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